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IN THE

Supreme Court of the United States

October Term, 1963

No. 811

JOHN C. YRIBARNE,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, S. WESLEY BREAK, PAUL J. YOUNG, RICHARD G. MANLEY, NANCY E. SMITH, ROSS DANA, BUD FULLER, KARL AGAJANIAN, FRED SCHNABEL, JOHN SPENCER, CHESTER JANTZEN, and D. L. MILES,

Appellees.

STATEMENT AS TO JURISDICTION.

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Appellees.

STATEMENT AS TO JURISDICTION.

Opinion Below.

The opinion of the District Court of Appeal, State of California, Fourth Appellate District (the only opinion below) is reported in 218 Adv. Cal. App. 387, 32 Cal. Rptr. 847. A copy is appended to this Statement as Appendix "A". It has not yet been printed in the official reports; but when it is it will be in 218 Cal. App. 2d .....

Jurisdiction.

1. The ground upon which the jurisdiction of this Court is invoked is that there was drawn in question below the validity of a stauute of the State of California

upon the ground of its being repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States; and the decision of the highest court of the state in which a decision could be had was in favor of the validity of the statute. The proceeding under the statute involved was the organization and incorporation of a municipal water district. The district as proposed and defined by private parties, includes lands owned by appellant, over the objection that they would not be benefited, and without any hearing or determination, or any opportunity for hearing or determination by any official or governmental agency of the question whether they were or would be benefited, by inclusion in the proposed district. [Clk. Tr., pp. 1-4.[1]]

2. The date of the judgment sought to be reviewed *i.e.*, the judgment of the District Court of Appeal of the State of California affirming a judgment of the Superior Court of that state, is July 17, 1963; and it was entered the same day. A timely petition for rehearing was denied by the District Court of Appeal on August 6, 1963. A petition to have the cause heard in the state Supreme Court after decision by a District Court of Appeal was denied by the Supreme Court on September 11, 1963. On October 14, 1963, a notice of appeal to the District Court of Appeal was filed in the Superior Court. An identical notice was filed in the District Court of Appeal on December 9, 1963; and as it is the latter, not the former court that was possessed of the record, this notice, no doubt, was the only effective notice

[1]The record consists of two transcripts denominated in the State practice "Clerk's Transcript" and "Reporter's Transcript" respectively. They are so referred to here, using the respective abbreviations "Clk. Tr." and "Rep. Tr."

of appeal. [*Market Street R. Co. v. Public Utility Com.*, 324 U.S. 548, 549-551; *Atherton v. Fowler*, 91 U.S. 143, 149.] The record that has been docketed here comes from the District Court of Appeal.

3. The statutory provision believed to confer jurisdiction of this appeal on this Court is 28 U.S.C.A. §1257 (2).

4. Cases believed to sustain the jurisdiction are: *Kansas City S. R. Co. v. Road Improvement District No. 3*, 266 U.S. 379, 385-386 (when the constitutional validity of a state statute, providing for assessment of lands within a special improvement district, is directly challenged in the state courts and there sustained, the case is properly in this court on writ of error); *Fiske v. Kansas*, 274 U.S. 380, 385 (when a state statute is enforced against a particular transaction over a distinct and timely insistence of repugnancy to the Federal constitution, the decision necessarily affirms the validity of the statute as so applied); *Chesebro v. Los Angeles County Flood Control District*, 306 U.S. 459, 462-463 (a question like the one presented here *held* substantial); *Atherton v. Fowler*, *supra*, 91 U.S. at 149 (when a notice of appeal was filed in the appellate court that retained a copy of the record upon which the case was decided, it was filed in the court having possession of the record); *Market Street R. Co. v. Public Utility Com.*, *supra*, 324 U.S. at 552 (the appeal was timely when taken within the requisite time after denial of a rehearing); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 341 U.S. 157, 159-160 (judgment sought to be reviewed is of the highest state court in which decision could be had when it is rendered by an intermediate appellate court and further review is denied.)

5. The state statute whose validity was drawn in question below is the California Municipal Water District Act of 1911 [Cal. Stats. 1911, c. 671, p. 1190] as amended [Cal. Stats. 1963, c. 150, c. 163, c. 1151, and c. 1513; *Cal. Water Code* (1963) Div. 20 beginning with Sec. 71000.] The statute is lengthy and so its pertinent text is set forth in Appendix "B" infra.[2]

Questions Presented.

Is it a denial of due process of law to a landowner to provide for the inclusion of his land without his consent in a special improvement or water district,

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[2]In summary, the statute provides for the organization of municipal water districts to acquire, construct and operate a water works system to store, supply, or otherwise use water within, and to render special water services to, the district. [*Cal. Water Code* (1963) secs. 71610-71617]. Proceedings for organization are initiated by the circulation of a petition praying therefor, to be presented to the county Board of Supervisors. [*Cal. Water Code* (1963) Div. 20, Pt. 2, c. 4, beginning with sec. 71120.] The boundaries of the proposed district are fixed by the proponents of the petition and are delineated in it. [*Cal. Water Code* (1963) sec. 71123]. When the petition is found to have been signed by the statutorily specified number of qualified voters the Board must call an election at which the voters within the district so delineated vote "Yes" or "No" upon the proposition "Shall the proposition to organize (Named) Municipal Water District under the Municipal Water District Act of 1911 as amended, be adopted?" [*Cal. Water Code* (1963) sec. 71165.] There is no provision in the statute for any hearing on or consideration or determination by any governmental agency of the question whether all or any of the included land or territory will be benefited by the operation of the proposed district, or for any hearing on or consideration or determination of the question which, if any, of the land or territory included by the proponents within the boundaries of the proposed district, should be excluded therefrom. The district has the power to acquire, construct, maintain and operate water systems, incur bonded and other indebtedness in the process, and pay that indebtedness by the levy of taxes upon the included land—all this without regard to the benefit or lack of benefit to the taxed land from the district's activities. [*Cal. Water Code* (1963) Div. 20, Pt. 5, beginning with sec. 71590. *Ibid.*, Pts. 6 and 7, beginning with sec. 71800.]

thereby subjecting the land to taxation and assessment to pay for the special improvements, without any hearing or determination or opportunity for hearing or determination by some competent state agency of the question whether the land is or will be benefited by the improvement?

Statement of the Case.

1. The case was decided below on the facts pleaded in the complaint, which facts for the purpose of decision were deemed to be true. These were the facts.

Appellant is the owner of 20 acres and 59 other lots of land in San Bernardino County, located in an area within the boundaries of a proposed municipal water district, as delineated by the proponents of a petition to organize the district under the California Municipal Water District Act of 1911.[3] [Clk. Tr., p. 1, line 29, to p. 2, line 10.] The number of signatures to the petition required by the Act as it then stood was obtained. [Clk. Tr., p. 2, lines 12-24.] The Board of Supervisors is mandatorily required, by the statute involved, [*Cal. Water Code* (1963), secs. 71160-71172] to call, and, indeed, has called an election to pass on the proposition whether the proposed district, with the boundaries delineated in the petition (thus including appellant's land and making it subject to taxation by the district to defray the district's indebtedness, the expenses and costs of its operation and the cost of the special improvements it constructs or acquires) should be organized.

The district is being organized to acquire Big Bear Lake in San Bernardino County for the purpose of regu-

[3]The proposed district is called the "Big Bear Municipal Water District."

lating its water level. [Clk. Tr., p. 2, line 26, to p. 3, line 2.] Appellant's property, proposed to be included within the district, is five miles distant from the lake and will receive neither water service nor any other benefit from the proposed district. Further, the property is situated in an area upon which the lake level has no effect in raising or affecting land values. [Clk. Tr. p. 3, lines 4-21.]

No provision exists for appellant to protest the inclusion of his land in the district or to have a hearing on, and consideration and determination by an appropriate legislative or other governmental department of, the question whether his land is or will be benefited by the proposed district and whether his land should be excluded therefrom. [Clk. Tr., p. 3, lines 15-21.] By reason of these facts appellant will be irreparably injured by the inclusion of his lands in the proposed district; and he is without an adequate remedy at law for such injury. [Clk. Tr., p. 4, lines 15-18.] Accordingly, and on the ground that the statute, as framed and as applied to him, denied him due process of law contrary to the Fourteenth Amendment to the United States Constitution, he prayed that the proposed election be enjoined, and for such other relief as the Court shall deem proper. [Clk. Tr., p. 3, lines 23-32; p. 4, lines 19-29.]

Since this appeal was taken the election has been held; and so, the question of an injunction against holding it is very likely moot. But that does not dispose of the case as a whole or of the constitutional question involved in it. Still alive and in controversy is the question whether the appellant's lands have been validly included in the district. If the statute under which the district was organized is constitutionally de-

fective, as appellant claims, it follows that such inclusion was not valid; and appellant is entitled to appropriate relief in that regard, to the end that he may no longer be subjected to the taxes, assessments and other burdens that the statute seeks to impose upon the lands.

In California, a plaintiff is not limited in the relief he may obtain, by his prayer (except in a default case) or by the designation he gives his action. He is entitled to whatever relief the *facts* pleaded and proved make appropriate. [*Buxbom v. Smith*, 23 Cal. 2d 535, 542-543, 145 P. 2d 305, 308.] The governing statute puts it succinctly: ". . . the court may grant him [plaintiff] any relief consistent with the case made by the complaint and embraced within the issue." [*Cal. Code of Civil Procedure*, sec. 580.]

There are, therefore, rights of the appellant that are in controversy and that should be protected. The necessary protection can be given within the framework of the pending action and the issues joined in it; as, for example, by enjoining the appellees from treating appellant's lands or acting in respect of them as though they were a part of the district; or by declaring that the proceedings alleged did not have the effect of making those lands a part of the district; or by enjoining the defendant county from levying and collecting taxes for the district. [See, *Cal. Water Code* (1963) secs. 72095, 72097.] Furthermore, the district is a continuing body. So long as it continues and the controversy over its validity is not settled appellant's lands will be included in it and subjected to its recurring orders and impositions. Such a case is not moot. [See, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 459; *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219

U.S. 498, 514-516; *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 308.]

2. The federal question sought to be reviewed was raised by appellant in his complaint, the first pleading filed by him. In it he averred the facts set out in section 1 of this Statement of the Case and specifically alleged that "insofar as it [the statute involved] authorizes the inclusion of plaintiff's [appellant's] properties within the proposed District without opportunity for a hearing and determination that it will be benefited thereby [the statute] is in violation of due process of law as guaranteed by . . . Amendment XIV to the Constitution of the United States . . ." [Clk. Tr., p. 3, lines 23-29.]

In the pre-trial statements of the parties, which were incorporated into the pre-trial order [Clk. Tr., p. 113, line 31, to p. 114, line 2], the issue of law involved in the case, it was agreed, was the constitutionality of the Municipal Water District Act under the federal due process clause. [Clk. Tr., p. 102, lines 12-29; p. 107, line 19, to p. 109, line 20.] In the California practice the pre-trial order supersedes the pleadings and "controls the subsequent course of the case . . ." [*California Rules of Court*, sec. 216.]

At the commencement of the trial appellees moved to determine first the issue of constitutionality. [Clk. Tr., pp. 115-116.] The motion was granted. [Rep. Tr., p. 3, line 17, to p. 4, line 10; p. 17, lines 11-13.] Appellees then objected to the introduction of any evidence upon the ground that appellant's complaint did not state facts sufficient to constitute a cause of action. [Rep. Tr., p. 4, line 24, to p. 6, line 24.] In the California practice such an objection is a general demurrer to the complaint. [*Miller v. McLaglen*, 82 Cal. App. 2d 219,

223, 186 P. 2d 48, 50; *Neff v. New York L. Ins. Co.*, 30 Cal. 2d 165, 175, 180 P. 2d 900, 907; *Parker v. Bozeron*, 40 Cal. 2d 344, 351, 254 P. 2d 6, 9.] It, therefore, admits the truth of the facts pleaded. [*Seeger v. Odell*, 18 Cal. 2d 409, 412, 115 P. 2d 977, 979; *Lee v. Hensley*, 103 Cal. App. 2d 697, 704, 230 P. 2d 159, 163.] The objection was also specifically grounded on the proposition that the Act in question was constitutional. [Rep. Tr., p. 5, lines 12-20.]

The argument on that objection centered on the constitutional question tendered by appellant's complaint. [Rep. Tr., p. 2, lines 2-26; p. 5, line 13, to p. 7, line 17.] The objection was sustained. [Rep. Tr., p. 12, lines 2-13.] The trial court in respect of the constitutional question said, ". . . the question in this case [is] solely a constitutional question; namely, the constitutionality of the Municipal Water District Act of 1911 . . . I have ruled granting the motion on constitutionality . . . the Court has made two rulings; one it sustained the objection of offer of any evidence, and two, it has granted your motion to determine the constitutional question and has now done so . . . ." [Clk. Tr., p. 2, lines 23-26; p. 17, lines 7-13.] As we have seen, appellant's complaint was based on the asserted unconstitutionality of the Act; and the motion of appellees, which was granted, was grounded on the opposite premise, that the Act was constitutional. It follows that by granting the motion the court necessarily affirmed the constitutional validity of the statute. [*Fiske v. Kansas*, *supra*, 274 U.S. at 385.] The trial court's judgment shows on its face that the constitutional question was entertained and decided in favor of the validity of the statute [Clk. Tr., p. 196, lines 1-10; Appendix "C" *infra*, p. 36.]

A judgment that appellant take nothing was then entered. [Clk. Tr., pp. 195-197.] It is appended to this Statement as Appendix "C". An appeal from it was taken to the District Court of Appeal.[4] [Clk. Tr., p. 201.] The Federal question was expressly raised in that court at appellant's first opportunity, i.e., by appropriate reference in his briefs.[5] The court affirmed the judgment of the trial court. It expressly entertained and decided the constitutional question in favor of the validity of the statute, saying, [218 Adv. Cal. App. 389, 390-391, 402; 32 Cal. Rptr. at 848, 856; Appendix "A", *infra*, pp. 1, 3, 20.] ". . . plaintiff alleges that the Municipal Water District Act of 1911 . . . is unconstitutional . . . plaintiff invokes . . . the Fourteenth Amendment to the Constitution of the United States. . . . Over 50 years ago, the California Supreme Court . . . held that the Act is constitutional. It was then under comprehensive attack under both the United States and the California Constitutions, and the decision that it did not offend any provision of either constitution was flatly adverse

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[4]Strictly speaking it is the judgment of the District Court of Appeal affirming the judgment of the trial court which is the "judgment . . . appealed from." [See, Rule 15(i).] In the California practice it is the appellate court's opinion [see Appendix "A"] or at least so much of it as defines the court's action, *i.e.*, affirmance, reversal or modification [see, *Cal. Code of Civil Procedure*, sec. 53], which is the appellate court's judgment. [See *Oakland v. Pac. Coast Lbr. & Mill. Co.*, 172 Cal. 332, 333, 337, 156 Pac. 468, 469, 470; *In re Jessup*, 81 Cal. 408, 471, 22 Pac. 1028, 1032; *Eaton v. Southern Pacific Co.*, 31 Cal. App. 379, 380-381, 160 Pac. 687, 688.]

[5]In California appellate practice there are no assignments of error or similar procedural devices. A question is raised on appeal by presenting and arguing it in the briefs. [*Richard v. Richard*, 123 Cal. App. 2d 900, 902-903, 267 P. 2d 867, 868; *Epperson v. Richmond*, 100 Cal. App. 2d 344, 347, 224 P. 2d 480, 481; *California Portland Cement Co. v. Boone*, 181 Cal. 35, 43, 183 Pac. 447, 450-451.]

to the position here taken by appellant. . . . It is enough to say that the law, as determined by the courts of this state, holds directly against him [appellant]."

Appellant petitioned for a hearing in the Supreme Court of California, which was denied on September 11, 1963. The appeal to this Court followed.

Substantiality of the Question.

1. In *Chesebro v. Los Angeles County Flood Control District, supra*, 306 U.S. at 462-463, a question virtually identical to the one here presented, in respect of a closely analogous California statute, was explicitly held by this Court to be substantial. The considerations of substantiality that prompted that holding are equally applicable here.

2. The decision below is in direct opposition to controlling decisions that have come from this Court, of which *Chesebro, supra*, 306 U.S. at 464, is a good example. There this Court stated the governing rule to be this:

> "When the district was not directly created by the legislature and there has been no determination by it that their property will be benefited by the local improvements the owners are entitled under the due process clause of the Fourteenth Amendment, to be heard by some officer or tribunal empowered by the State to hear them and decide whether their lands will be specially benefited. . . ."

In the instant case the proposed district was not created by the legislature. It came into existence by virtue of the approval at an election of a petition prepared and circulated by private persons, in which petition the lands to be included were described. It is these

private persons who fixed the boundaries of the district and thus determined what lands were to be included in the district. The statute neither requires nor permits a hearing or determination by anyone whether the included lands will be benefited. A holding that such a statute does not deny due process flies directly into the teeth of the *Chesebro* case.

That case does not stand alone. To the same effect are: *Browning v. Hooper*, 269 U.S. 396, 404-406, (holding a statute substantially similar to the one here involved repugnant to the due process clause of the Fourteenth Amendment); *Norwood v. Baker*, 172 U.S. 269 (holding unconstitutional a statute permitting imposition of the cost of a street opening upon abutting property without regard to benefit and without opportunity to be heard on the question of benefit to the burdened land); *Embree v. Kansas Road Dist.*, 240 U.S. 242, 247 (recognizing the necessity for providing an opportunity to be heard on the question of benefits, but holding the statute there involved valid because it did provide such an opportunity); *Myles Salt Co. v. Iberia Drainage Dist.*, 239 U.S. 478, 485 (holding the statute, and its application to included lands not benefited by the improvement for which the assessment was levied, to be unconstitutional confiscation); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 166-167, 170-171, recognizing the rule that when a special improvement district is not formed directly by the legislature an opportunity must be accorded for a hearing on the question of benefit to the included or burdened land, but holding the statute there involved valid because it did provide for the requisite hearing.

The question, therefore, is not one that can be summarily dismissed. In view of decisions such as those

just cited, the probability that the question was incorrectly decided below is, at the very least, high.

No doubt an argument in favor of the constitutionality of the Act can be made, basing it upon decisions such as *Utley v. St. Petersburg, 292* U.S. 106. Decisions of this kind are readily distinguishable.[6] That very fact emphasizes the substantiality of the question. Reconciliation of the seemingly conflicting lines of decision and application of the correct line to the facts of the instant case will need close analysis, careful briefing and oral argument. Such needs are the indicia of substantiality. [*Cf.*, U.S.S.C. Revised Rules (1954), Rule 15 (e).]

3. Under the Act the power to define the boundaries of the District and thus to determine what and whose lands shall be included is conferred upon private parties, subject only to a possible veto by the vote of the other property owners in the proposed district. If a majority of those voting approve, the boundaries become fixed, and the included lands become subject to taxation and assessment for improvements that may not, and in this case that, it is shown, do not benefit the burdened land. [*Cal. Water Code* (1963) secs.

[6]They hold only that there "is no constitutional privilege to be heard in opposition at the *launching* of a project which may end in assessment. It is enough that *a hearing is permitted before the imposition of the assessment as a charge upon the land* . . ." (Italics ours.) The statute involved in the case at bar provides for no hearing even at that time. Indeed, it does not provide for any hearing at all on the question of benefits. Furthermore, the Act itself fixes a three-months period of limitation upon actions in which the validity of the incorporation of the district is denied. [*Cal. Water Code* (1963), sec. 71196] It is extremely unlikely that a tax or assessment, furnishing the occasion for an attack on the validity of its incorporation on the ground of inclusion of non-benefited lands, will be imposed within that three-months period.

71120, 71123, 71165; Appendix "B", *infra*, pp. 21, 22, 23.] Control over appellant's property is thus delegated to private persons. That control is exercisable simply by majority vote and without legislative standards or any power of governmental supervision or official review. Such delegation of control over another's property has been held, in analogous contexts, to be obnoxious to the due process clause of the Fourteenth Amendment. The cases in that connection are:

> *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, holding unconstitutional a statute that permitted a particular use of land to be made within a specified district only if two-thirds of the property-owners within the district and a specified distance from the land in question consented to the use.
>
> *Eubank v. Richmond*, 226 U.S. 137, holding unconstitutional a statute that permitted a mandatory setback line to be established on a street by the consent or request of the owners of two-thirds of the property along that street.
>
> *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-312, holding unconstitutional a statute that permitted a specified percentage of those engaged in a given industry to fix maximum hours and minimum wages binding on all so engaged.

The analogy of these decisions to the facts of the instant case cannot be shrugged off. Whether the analogy is a real one and, therefore, one that makes the rationale of the decisions applicable at bar is a question that also requires careful briefing, argument and consideration. The existence of such a question makes a plenary hearing very desirable if, indeed, not virtually mandatory.

4. Nearly half a century ago the Supreme Court of California upheld the constitutionality of the Municipal

Water District Act. [*People v. Henshaw*, 176 Cal. 507, 169 Pac. 82.] No review in this Court was sought. Since then the California courts have adhered to this original decision. [See opinion below, 218 Adv. Cal. App. at 391, 32 Cal. Rptr. at 848-489, Appendix "A," *infra*, p. 3.] As a consequence of the state court's original error and the ensuing adherence to it, landowners in California, as is appellant, are being denied their constitutional rights. The instant case presents this Court with its first opportunity to put the course of decision in this field in California on the right track.

It is important that this be done. The population of California continues to expand tremendously. As a consequence, more and more heretofore uninhabited or sparsely inhabited territory is being built up with a resulting need for water supplies and services, and for other special improvements, to be supplied by statutory districts. More and more the Water District Act and similar legislation will be resorted to. The question whether the procedure ordained by that legislation is a constitutional one is, and is bound to continue to be, of substantial importance to large numbers of people. Similar problems will be engendered in other states by the present pronounced trend toward "retreat to suburbia."

Conclusion.

Probable jurisdiction of this cause should be noted.

Dated: February 4, 1964.

Respectfully submitted,

HERMAN F. SELVIN,
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APPENDIX "A".

Opinion of the Court Below.

The plaintiff, as a taxpayer and property owner within the boundaries of the proposed district, brought suit against the County of San Bernardino and the members of its board of supervisors to restrain them from calling an election or acting further in response to a petition for the organization of the "Big Bear Municipal Water District." In his complaint the plaintiff alleges that the Municipal Water District Act of 1911, hereinafter referred to as the Act (Stats 1911, ch. 671, p. 1290, as amended; Deering's Water Uncodified Acts No. 5243; West's Wat. Code App., § 20) is unconstitutional and that the plaintiff would suffer irreparable injury and damage if the defendants should call the election; the points made with respect to its claimed unconstitutionality are: (1) that "(I)t authorizes the inclusion of plaintiff's properties within the proposed district without opportunity for a hearing and determination that it will be benefited thereby," and (2) that the act involves ". . . an unconstitutional delegation of the legislative power to determine the boundaries of a municipal water district to private persons of unknown identity"; plaintiff invokes the provisions of article I, section 14, of the Constitution of the State of California and the 14th Amendment to the Constitution of the United States.

The court granted a preliminary injunction, which is still in effect, but specifically stated in the order: "This Court is not at this time determining the constitutionality of the MUNICIPAL WATER DISTRICT ACT OF 1911, (Statutes 1911, pg. 1290), as amended."

Permission was granted for the filing of an answer in intervention by the members of the committee of citizens which activated the preliminary moves looking to the foundation of the new district: Bud Fuller, Karl Agajanian, Fred Schnabel, John Spencer, Chester Jantzen and D. L. Miles.

Before the case came on for hearing, the defendants and interveners made an application for an order that the court determine as the first issue at the trial whether the Municipal Water District Act of 1911, as amended, is constitutional. The court quite properly acceded to the request, for the plaintiff would have no right to a recovery unless he prevailed on that issue; it is not claimed that the proponents have failed to comply with any of the preliminary procedural requirements prescribed by the Act; all that remains to be done is for the Board of Supervisors of San Bernardino County to set a date and make arrangements for the election.

Besides granting the motion to try first the issue of the constitutionality of the Act, the court permitted counsel for the plaintiff, in the guise of an offer of proof, to assure the court that if he were permitted to do so, he could adduce evidence to support all of the factual allegations of the complaint. Counsel for the defendants and interveners also made it clear that they believed that if the case were to be completely tried, the factual issues undetermined by a ruling on the constitutionality of the Act would be resolved in favor of defendants. Actually, these clashing claims as to what the proof might show on the other issues, or the ruling of the trial judge upholding an objection to receiving any evidence, are not essential to the determination of this appeal. If the ruling of the trial court that the

Act is constitutional is correct, that will conclude the case; if the Act is unconstitutional the suit will be remanded for trial on all tendered issues.

Over 50 years ago, the California Supreme Court in *Henshaw v. Foster*, 176 Cal. 507, held that the Act is constitutional. It was then under comprehensive attack under both the United States and the California Constitutions, and the decision that it did not offend any provision of either Constitution was flatly adverse to the position here taken by the appellant. In the intervening lapse of time, the Supreme Court and District Courts of Appeal in numerous instances and without exception have recognized the existence and binding force of the Act, including *Marin Municipal Water District v. Chenu*, 188 Cal. 734; *Jacobsen v. Superior Court*, 192 Cal. 319; *Haight v. Marin Municipal Water District*, 208 Cal. 753; *Morrison v. Smith Bros., Inc.*, 211 Cal. 36; *State of California v. Marin Municipal Water District*, 17 Cal. 2d 699; *County of Marin v. Superior Court of Marin County*, 53 Cal. 2d 633; *Wilson v. City of San Bernardino*, 186 Cal. App. 2d 603; *Hidden Valley Municipal Water District v. Calleguas Municipal Water District*, 197 Cal. App. 2d 411; *City of San Diego v. Otay Municipal Water District*, 200 Cal. App. 2d 672. While all of these cases do not in so many words reaffirm the constitutionality of the Act, their citation of the *Henshaw* case, *supra*, assumes that the water districts organized under the Act are constitutional and legally existing.

The holding in the *Henshaw* case is binding in all strictness upon us as an intermediate appellate court. (*Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455.) And, in fact, we have held in *Wilson v.*

City of San Bernardino, supra, 186 Cal. App. 2d 603, that the Act is constitutional.

The lapse of over 50 years since the *Henshaw* decision, the specific and comprehensive consideration of all questions of constitutionality contained in that opinion, the subsequent formation and functioning of 48 municipal water districts under its provisions, all lead to the inevitable conclusion that the Act must again be upheld. *Stare decisis* requires an affirmance of the judgment.

In *People v. Hayne*, 83 Cal. 111, 116, in upholding the constitutionality of a statute providing for the appointment of court commissioners, the Supreme Court said:

> "To reverse a construction which must of necessity have been given to these statutes before or at the time of the appointment of these commissioners, and which has been acquiesced in for so long a time, and thereby produce such a result as would follow such reversal, is a thing which ought not to be done by any court, unless there is found the gravest necessity for doing it. If the question of the constitutionality of the act was even doubtful, after such a lapse of time and such a practice under the act, the doubt ought to be resolved in favor of its validity, and the case be left to rest on the doctrine of *stare decisis.*"

(See also *Kleiber v. City & County of San Francisco,* 18 Cal. 2d 718, 725; *Miller & Lux v. Enterprise etc. Co.,* 142 Cal. 208, 215; *City of Los Angeles v. Gager,* 10 Cal. App. 378, 381; *Seale v. Mitchell,* 5 Cal. 401.)

We would be fully justified to stop here and affirm the judgment. However, we shall supplement the foregoing observations by a concise discussion of the constitutional questions raised by the appellant.

First, he contends that the Act is unconstitutional because there is no provision made in it for a preliminary determination by the board of supervisors as to whether the real property of the plaintiff will be benefited by its inclusion within the exterior boundaries of the proposed district.

In view of the plenitude of the power of the Legislature, restricted only by the provisions of our state and federal Constitutions, it is not to be wondered that there exists considerable variety in the forms, and methods of creation, of the districts authorized by our laws. Certain types of districts require a pre-election hearing and decision by the supervisors of a county in which the proposed district is to be located as to whether included lands will be benefited. Irrigation districts and reclamation districts are among those which so require; in such circumstances in order to comply with the basic provisions of the applicable statutes, such preliminary hearings must, of course, be held. (The Wright Act (Stats. 1887, ch. 34, p. 29); *In re Madera Irrigation District*, 92 Cal. 296; *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112; Wat. Code, Reclamation Districts, div. 15.)

Other districts provided for by our laws are limited in function to the making of specific improvements in a given area when the mere inclusion of the land of people living within the proposed district would subject them to the levy of assessments to pay for the work to be undertaken in accordance with benefits actually received by

them. This type of organization, generally known as an assessment district, requires as an essential prerequisite to its formation a hearing on the question whether the lands included within its exterior boundaries would be benefited by the formation of the district. (For example, see The Improvement Act of 1911, Sts. & Hy. Code, div. 7; Highway Lighting District Act, Sts. & Hy. Code, div. 14; Storm Drain Maintenance District, Wat. Code App., §42; Pest Abatement District, Health & Saf. Code, div. 3.)

But the Legislature has the rightful power also by general law to authorize the formation of a district such as is proposed here without any hearing preliminary to the election as to whether the land included will be benefited. This type of district has been termed a *quasi*-municipal district. It is formed for the purpose of supplying general municipal needs, although these needs may be specific in their delineated character; the creation of this type of district is not for the purpose of making a specific and narrowly limited improvement, but is comparable to the organization of a city; whatever assessments are made are, like taxes, general in nature and based on the valuation of the several parcels of land within the district. Not only does this classification apply to municipal water districts, but to many other districts whose purposes and general powers are defined by statute pursuant to article XI, section 19, of our state Constitution.

The nature of the powers conferred upon municipal and *quasi*-municipal corporations and the territory included within such organizations are political questions to be determined in the discretion of the state, subject only to constitutional limitations; the solution of such questions rests with the Legislature.

In *Morrison v. Smith Bros., Inc., supra,* 211 Cal. 36, at page 44, this type of district is thus characterized by the Supreme Court:

> "Thus, from 1911 to date, there has been developed a new type of public corporation, resembling in many respects municipal corporations proper, and radically different in nature from irrigation and reclamation districts. The case of *Henshaw v. Foster, supra* (176 Cal. 507) clearly recognized the distinction, holding that such *quasi*-municipal corporations were municipal corporations within the meaning of article XI, section 19, of the state Constitution."

This language was quoted with approval by Mr. Chief Justice Gibson in the opinion in *Metropolitan Water District v. County of Riverside*, 21 Cal. 2d 640, 642-643.

In re Orosi Public Utility District, 196 Cal. 43, upheld the validity of that organization under the Public Utility District Act in its original form. (Stats. 1921, ch. 560, p. 906.)* That act, which like its companion legislation, the Municipal District Act (Stats. 1921, ch. 218, p. 245), was closely patterned on the Municipal Water District Act, provided for the formation of public utility districts; the Supreme Court in upholding its constitutionality said (p. 56):

> "It is significant that, when the legislature came to pass the act extending to the inhabitants outside of incorporated cities and towns the privileges in regard to the acquisition and use of their own

*In 1953, the Public Utility District Act was amended (Pub. Util. Code, § 15736) to provide for a hearing relative to benefits to lands proposed to be included within a district with the right accorded to the board of supervisors to exclude lands not benefited.

public utilities that are granted by the state constitution to municipalities, it should have followed so closely the language of the constitutional amendment of 1911 in the statement of the purposes for which the districts may be created. We are convinced that it was its intention to provide for the creation of public corporations of a *quasi*-municipal character, with power to carry on the particular functions committed to them."

The court then pointed out (pp. 58-59) that the primary purpose of the statute was to form a *quasi*-municipal corporation, which in the first instance was to be self-sustaining, to pay its own way out of revenues derived from services provided, and the court says:

"These provisions clearly establish the contention that the essential purpose of the act is to form a *quasi*-municipal corporation which may acquire and operate public utilities and pay for their operation from rates to be paid by those enjoying the service. . . . It is only when the revenues of the district shall be inadequate to pay the principal or interest of any bonded debt, as it becomes due, that the board of directors must, or, when funds are needed to carry out the objects and purposes of the district which cannot be provided for out of its revenues, that the board of directors may levy a tax for such purposes (section 39). These provisions make it clear that the 'primary purpose' of the act (*Miller & Lux v. Board of Supervisors, supra* (189 Cal. 254) was not that of assessing upon private lands the benefits to be derived from the acquisition of public utilities."

The Court further noted (pp. 51-52):

> "The rule laid down in *Fallbrook Irr. Dist. v. Bradley, supra* (164 U.S. 112) which has been so constantly adhered to by this court in its application to assessment districts formed for the purpose of assessing upon private lands the benefits to accrue from the particular public improvement for the construction of which the district was formed (*Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 267 (208 Pac. 304)), does not apply to every kind of public or *quasi*-public corporation. There is an obvious distinction to be drawn between an act providing for the formation of an assessment district, and which practically authorizes property owners, without notice, to place burdens on the property of others for the sole purpose of improving their own property, and an act providing for the formation of a quasi-municipal corporation or a municipality. (*People v. Ontario*, 148 Cal. 625, 632 (84 Pac. 205); *Wilcox v. Engebretsen*, 160 Cal. 288, 293 (116 Pac. 750).) That distinction it was pointed out in the latter case, is to be made between the proceedings of a board, acting in pursuance of some delegated legislative authority in creating a political subdivision of the state, as a county or a city, a proceeding which does not directly affect private property, and proceedings which do directly charge or affect such property."

Speaking of the districts which are not municipal in character, the opinion continues (p. 53):

> "One of the distinguishing features of such districts is that they are created for the purpose, generally, of some special local improvement, and may

exercise only such powers as may be conferred by the legislature in the line of the object of their creation. They are merely special state organizations for state purposes, created to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. The other distinguishing feature is that the exactions which such districts may enforce in order to carry out their purposes are in the nature of assessments or taxes for local benefits, to be spread on the property in the districts in proportion to the peculiar advantage accruing to each parcel from the improvement. (Citing authority.) Such an exaction is generally in the form of a special assessment, but even if it is in the form of a tax it is nevertheless an assessment for local benefits."

Concerning legitimate objectives in the creation of municipal corporations, the court said (p. 57):

"The creation of municipal corporations does not have for its sole object the formation of political subdivisions of the state for governmental purposes, but there is also the association of the members of the particular community for the administration of their local business and affairs in matters largely outside of the sphere of government as such. (Citations). It is quite apparent to us that the legislature had in view such association of the people living in the outlying districts, when it enacted the statute providing for the formation of public utility districts in the unincorporated territory of the state. It thereby provided for the creation of public agencies or *quasi*-municipal corpora-

tions, the declared purpose of the act being to extend to the inhabitants of such districts, when properly organized, advantages in the use and benefit of certain utilities which they might not be able to obtain in any other way, and which, from common experience, we know tend to promote the general welfare of the people of the state. That it had the power to do so cannot be denied. While the proposed constitutional amendment was pending in 1911, this court held that there was no provision in the state constitution which either expressly or by implication forbade the acquisition, ownership, or operation of public utilities by a municipality, or which prohibited the legislature from granting a municipality the power to acquire, own, and operate them."

The court then points out (p. 58) that it is:

". . . now a generally accepted proposition that, while a municipality, which undertakes to supply those of its inhabitants who will pay therefor with utilities and facilities of urban life, is performing a function not governmental, but more often committed to private corporations or persons with whom it may come into competition, it is, in fact, engaging in business upon municipal capital, and for municipal purposes. (28 Cyc. 125.) Any tax, therefore, levied and collected for the purpose of supplying such municipal capital is not a tax or assessment on property directly benefited by the construction of some local improvement, but is a general tax levied just as, and for the same purpose that, any general municipal tax is imposed for carrying on the governmental functions and utilitarian objects of duly incorporated cities or towns."

And in elaboration of this principle, the court further states (p. 59) that:

> "When the cost of any public utility to be acquired, completed, or constructed can be paid out of the revenues of the district derived from the operation of its public utilities, in addition to the other necessary expenses of the district, the board of directors must determine the cost of such utility, the method and manner of payment therefor, and submit the question of its acquisition upon such terms to the electors. If the cost cannot be met in that way, a district bonded indebtedness may be incurred in the manner provided by the act."

Respecting the constitutional question involved in providing what shall constitute the territory involved, the opinion continues (p. 60):

> "The constitution does not attempt to limit the power of the legislature in providing for the determination of the question as to what shall constitute municipal territory. Consequently, in the matter of forming cities or towns, questions as to population, extent, and character of territory to be included are matters left entirely with the legislative department. (*People ex rel. Russell v. Town of Loyalton*, 147 Cal. 774, 778 (82 Pac. 620).)"

In concluding that the district had been formed in accordance with the strict letter of law, the court says (pp. 60-61):

> "We have been cited to no authorities which hold that the requirement as to due process of law gives a property owner an absolute right to notice and

hearing before his property may be included within the limits of a municipality or a *quasi*-municipal corporation, by reason of the creation of which his property will be subjected only to the burden of a general tax for the purposes for which the district was formed, in contradistinction to a tax or assessment for some local benefit. Appellant was not, therefore, entitled to notice and opportunity to be heard on the question of benefits to his land before it could be included within the boundaries of the respondent district. The act under which it was formed directs that in the event it becomes necessary to levy a tax for carrying out the objects and purposes of the district, the board of directors may, by ordinance, provide the manner and mode of assessing, and of correcting and equalizing assessments upon, the taxable property situated within the district, and may provide for the collection of delinquent taxes by actions or legal proceedings, provided that the provisions of such ordinance shall be conformable to general law, or it may accept the assessment for district purposes made by the county assessor (section 39). Whatever may be the method of assessment that shall be adopted, if provision be made for the correction of errors committed by the assessor, through a board of revision or equalization, with power to hear, after notice, complaints respecting the justice of the assessment, the proceeding by which the valuation is determined, though it may be followed, if the tax is not paid, by a sale of the delinquent's property, is due process of law. (*Hagar v. Reclamation Dist. No.108*, 111 U.S. 701, 710 (28 L.Ed. 569,

4 S.Ct.Rep. 663, see, also, Rose's U.S. Notes); *Fallbrook Irr. Dist. v. Bradley, supra,* at p. 175; *People v. Town of Ontario, supra,* at p. 633.)"

Wilson v. Board of Supervisors, 154 Cal. App. 2d 101, 110, expressly declared the constitutionality of the Municipal Utility District Act. The *Wilson* case relied on *People v. Town of Ontario,* 148 Cal. 625, 631, which in turn relied on *In re Madera Irrigation District, supra,* 92 Cal. 296, 307, 318, both of which are quoted to the effect that there is no constitutional provision that intimates that this power can be conferred by the Legislature "*only on some legislative body, and not upon the electors of the locality to be affected.*" (Italics added.)

Another *quasi*-municipal district similar in form and organization, the Golden Gate Bridge and Highway District, has twice been approved as to its constitutionality by the Supreme Court. In 1923, the Bridge and Highway District Act was passed (Stats. 1923, ch. 228, p. 452); it provided for the acquisition, construction and operation of bridges and approaches thereto.

In *Wheatley v. Superior Court,* 207 Cal. 722, 726, it is said:

"We think the corporate structure under consideration here is analogous to a municipal water district, a public utility district, a municipal utility district and a metropolitan water district. The procedure for the formation and the operation of them all is strikingly similar. These various districts have been held valid as public and *quasi*-municipal corporations or districts and the statutes under which they have been formed have been upheld in the fol-

lowing cases: *Henshaw v. Foster,* 176 Cal. 507 (169 Pac. 82); *In re Orosi Public Utility Dist.,* 196 Cal. 43 (235 Pac. 1004); *In re East Bay Utility Dist.,* 196 Cal. 725 (239 Pac. 38); *City of Pasadena v. Chamberlain,* 204 Cal. 653 (269 Pac. 630). In *Doyle v. Jordan, supra* (200 Cal. 170 (252 Pac. 577)) the statute under which the bridge and highway district was formed was classed with the statutes involved in the cases above cited and its validity sustained upon the authority of such cases. We think this is a public and *quasi*-municipal corporation within the rule of cases cited. *(Johnson v. San Diego, supra* (109 Cal. 468 (42 Pac. 249)).''

And in the court's opinion in *Golden Gate Bridge & Highway District v. Felt,* 214 Cal. 308, 324, it is said:

"It is not an assessment district, where the tax must be levied in accordance with benefits actually received by the individual taxpayer. It is, as we declared in the *Wheatley* case and as hereinbefore repeated in this opinion, a *quasi*-municipal corporation."

In 1927 the Metropolitan Water District Act (Stats. 1927, ch. 429, p. 694) was passed; it also provided for the formation of *quasi*-municipal corporations, which as to the theory of organization are essentially the same as municipal water districts. The following cases approved formation of districts pursuant thereto: *City of Pasadena v. Chamberlain,* 204 Cal. 653, 663; *Metropolitan Water District v. County of Riverside, supra,* 21 Cal. 2d 640, 642.

The second major argument which the appellant advances against the judgment is that there is an uncon-

stitutional delegation of legislative power in the Act, because it is claimed that it gives to a relatively small group of persons as proponents (1) the right to determine the boundaries of the district to be formed, and (2) as a consequence, the power to determine the roll of votes at the election for the organization of the district. Furthermore, it is argued that: "The Act contains *no standards whatever* to guide them in exercising this power." These claims of appellant are unsound.

In re Madera Irrigation District, supra, 92 Cal. 296, dealt with a statutory situation in which it was urged that a petition of 50 freeholders owning lands within the proposed boundaries of a district could impose a burden upon the owners of all land within the district even though the freeholders might constitute a small minority of the electors or even be nonresidents of the district. Of this argument the Supreme Court said (p. 320):

> "This, however, is a matter which was addressed purely to the discretion of the legislature. Whether such a petition should be made by the owners of a fixed proportion of the land, as was required in the reclamation law, or whether there should be any qualification to the petitioners, or whether there should be any limit to the expenses which they were authorized to incur for the purposes of the improvement, are questions which were solely for the consideration of the legislature."

This is a conclusive answer to appellant's assertion that *"the proponents of the district have determined who is included in the electorate."*

The Act itself provides a sufficient standard for the proponents contrary to appellant's claim that there are

"no standards whatever to guide them." Section 2 of the Act (West's Wat. Code Ann. App., §20-2 (territory which may be included) and section 20-31 of the Act as amended (West's Wat. Code Ann. App., §20-31) ("districts . . . may contain lands situate in more than one county"), set up basic guide lines. The proponents in the first instance draw the exterior boundaries, controlled by these two sections of the Act which permit large expanses of territory to be included; in the final analysis, it is the electors living within those proposed boundaries to whom the Legislature has committed the power to determine by their votes whether the formation of the district within such specified boundaries is acceptable.

In *People v. Town of Ontario*, supra, 148 Cal. 625, 629, the Supreme Court held the act for annexation of territory to incorporated towns and cities (Stats. 1889, ch. 247, p. 358) to be constitutional. It provided that ". . . upon receiving a written petition therefor containing a description of the new territory asked to be annexed to such corporation," and signed by not less than one-fifth of the qualified electors of the annexing city, the city council ". . . must, without delay, submit to the electors of such municipal corporation, and to the electors residing in the territory . . . to be annexed . . . the question whether such new territory shall be annexed. . . ."

Of these provisions the court said at page 628 of the opinion that: "It will be observed from the foregoing that no discretionary power whatever is vested in any legislative body with regard to the boundaries of the territory proposed to be annexed."

To the argument that the Act was unconstitutional because ". . . the absolute power to finally determine the boundaries of the territory proposed to be annexed" was given to private citizens and not to any legislative body recognized by the Constitution, the court held that there was no improper delegation of power and no violation of constitutional provisions, saying (pp. 629, 630-631):

> "It is expressly provided by our constitution that corporations for municipal purposes shall not be created by special laws, and that 'the legislature, by general laws, shall provide for the incorporation, organization, and classification in proportion to population, of cities and towns.' (Art. XI, §6.) This provision necessarily includes not only the creation of new municipal corporations, but also the matter of adding new territory to an existing corporation and the exclusion of territory embraced in such a corporation from further connection therewith. . . . From the nature of things, the legislature cannot by general laws fix the boundaries of municipal corporations. It can do no more than provide the method by which boundaries can be fixed and the territory included therein impressed with the character of municipal territory.
>
> . . .
>
> "As has already been said, the principal objection to the method here adopted is the one relative to the fixing of the precise boundaries. The fixing of the boundaries of a municipality is ordinarily held to be the exercise of legislative power, but assuming it to be such in its nature, in view of the constitutional provision relative to the creation of

municipal corporations, it does not follow that the legislature may not confer the power to declare the precise boundaries upon the electors of the district to be affected. The conferring of such power is not a delegation of legislative power at all, for the legislature is expressly prohibited from defining the boundaries. It fully exercised its own legislative power by the enactment of the general law in the matter. Necessarily, for the execution of such general law, the power to define the exact boundary-lines of each particular municipality created or enlarged after the adoption of the constitution must be by such a law placed somewhere. . . . There is no constitutional provision that intimates that this power can be conferred only on some legislative body, and not upon the electors of the locality to be affected, and in the absence of such a provision the question as to whether it shall be given to the one or the other is purely one of policy, upon which the determination of the legislature is conclusive. (See *In re Madera Irr. Dist.*, 92 Cal. 296, 307, 318 (28 Pac. 272, 675, 27 Am. St. Rep. 106).)"

The principles already discussed have led to the approval of municipal water districts, as we have seen, in the case of *Henshaw v. Foster*, *supra*, 176 Cal. 507, 513-514, and also to public utility districts, municipal utility districts, metropolitan water districts and bridge and highway districts, all of which are public and *quasi*-municipal organizations.

Thus, the principal contentions of the appellant are found to run directly counter to cases which have been decided adversely to him on the very questions involved.

It would be an unnecessary and indeed a somewhat invidious task to attempt to differentiate all of the distinctions, philosophical and otherwise, which plaintiff's counsel seek to import into a discussion of the cases which hold directly against them. Much of their argument might have been considered pat and arresting if made before the decision of *Henshaw v. Foster, supra,* 176 Cal. 507. But the arguments come 50 years too late, and it is clear that they are unavailing, particularly in this court, which is bound to follow the law as previously clearly enunciated. We therefore will not unduly lengthen this opinion by making observations on all of the minutiae of appellant's arguments. It is enough to say that the law, as determined by the courts of this state, holds directly against him.

The judgment is affirmed. Upon the going down of the remittitur the trial court is directed forthwith to order the dissolution of the preliminary injunction.

Conley *J. Assigned**

We Concur:

Griffin *P. J.*

Brown G *J.*

*Assigned by Chairman of Judicial Council.

APPENDIX "B".

Relevant Text of the Statute Involved.

An act to add Division 20 (commencing with section 71000) to the Water Code, thereby revising and consolidating the law relating to municipal water districts, including provisions for the supervision, regulation, and conduct of such districts, and to repeal the Municipal Water District Act of 1911 (Chapter 671, Statutes of 1911).

* * * *

71060.

The people of any county or counties, or of any portions thereof, whether such portions include unincorporated territory only or incorporated territory of any city or cities, or both such incorporated and unincorporated territory, may organize a district under the provisions of this division.

* * * *

71120.

A petition for the formation of a district, which may consist of any number of separate instruments, shall be filed with the county clerk.

71121.

The formation petition shall be signed by voters residing within the proposed district equal in number to at least 10 percent of the number of such voters voting for all candidates for the office of Governor at the last preceding gubernatorial election. If one or more cities are included in the proposed district, the formation petition shall, in addition, be signed by at least 10 percent of the voters of each such city so voting at such election.

* * * *

71123.

The formation petition shall describe the boundaries of the proposed district and shall contain a prayer that the proposed district be formed pursuant to this division.

* * * *

71125.

The circulation of a formation petition shall be commenced by the proponents within 30 days from the date of the filing of the declaration of intention with the county clerk. The petition shall be circulated and filed with the county clerk within 90 days from the date of the filing of the declaration of intention.

* * * *

71128.

If the county clerk finds from the examination that the formation petition is signed by the requisite number of voters residing within the boundaries of the proposed district, and within the boundaries of each city included therein, he shall certify that the petition is sufficient. If he finds that it is not so signed, he shall certify that the petition is insufficient.

* * * *

71133.

If the county clerk's certificate shows that the formation petition is sufficient, the county clerk shall present the petition to the board of supervisors without delay.

* * * *

71135.

If there is a registrar of voters in the principal county, upon the filing of the formation petition with the county clerk, the county clerk shall forthwith deliver the petition to the registrar of voters, who shall per-

form the duties required by this article to be performed by the county clerk respecting the examination and certification of the formation petition. Immediately upon his completion of the examination, the registrar of voters shall return the petition, together with his certificate showing the result of the examination, to the county clerk. The county clerk shall thereupon present the petition, with the certificate of the registrar of voters attached thereto, to the board of supervisors.

* * * * *

71160.

When a formation petition is presented to it, the board of supervisors shall make an order dividing the proposed district into five divisions in such manner as to equalize, as nearly as practicable, the population in the respective divisions. The board of supervisors shall use for this purpose the population as estimated by it from the register of voters used at the last general election.

The divisions of the district shall be numbered first, second, third, fourth, and fifth.

71161.

When the order dividing the proposed district into five divisions is made, the board of supervisors shall by resolution or ordinance call and provide for the holding of an election, in the proposed district for the purpose of determining whether the district shall be formed and to elect the first board of directors if the district is formed.

* * * * *

71165.

The following measure shall be submitted at the formation election:

"Shall the proposition to form the . . . Municipal Water District under the Municipal Water District Law of 1911 be adopted?"

* * * *

71190.

If a majority of the votes cast in each affected county at the formation election favor the formation of the district, the board of supervisors shall, by an order entered on its minutes, declare the territory included within the proposed boundaries to be formed as a municipal water district under the designated name.

* * * *

71196.

Any proceeding wherein the validity of the incorporation of a district is denied shall be commenced within three months from the date of the Secretary of State's certificate of incorporation; otherwise the incorporation and legal existence of the district and all proceedings in respect thereto shall be held to be valid and in every respect legal and incontestable.

* * * *

71591.

A district may:

(a) Have perpetual succession.

(b) Adopt a seal and alter it at pleasure.

71592.

A district may make contracts, employ labor, and do all acts necessary for the full exercise of its powers.

* * * *

71610.

A district may acquire, control, distribute, store, spread, sink, treat, purify, reclaim, recapture, and salvage any water, including sewage and storm waters,

for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district.

71611.

A district may sell water under its control, without preference, to cities, other public corporations and agencies, and persons, within the district for use within the district.

71612.

Whenever the board finds that there is a surplus of water above that which may be required by consumers within the district, the district may sell or otherwise dispose of such surplus water to any persons, public corporations or agencies, or other consumers.

* * * *

7164.

A district may fix the rates at which water shall be sold. Different rates may be established for different classes or conditions of service, but rates shall be uniform throughout the district for like classes and conditions of service.

* * * *

71660.

A district may construct, maintain, improve, and operate public recreational facilities appurtenant to any water reservoir operated or contracted to be operated by the district. It may by ordinance provide regulations binding upon all persons to govern the use of such facilities, including regulations imposing reasonable charges for the use thereof. Violation of any such regulation is a misdemeanor.

* * * *

71670.

A district may acquire, construct, and operate facilities for the collection, treatment, and disposal of sewage, waste, and storm water of the district and its inhabitants. It may prescribe, revise, and collect rates or other charges for the services and facilities furnished pursuant to this article.

71671.

The revenues from the rates and charges for services and facilities furnished pursuant to this article may be used for the following purposes:

(a) To pay the operating and maintenance expenses of the facilities.

(b) To provide a reasonable surplus for improvements, extensions, and enlargements.

(c) To pay the interest on any bonded debt for the facilities.

(d) To provide a sinking or other fund for the payment of the principal of such bonded debt as it becomes due.

71672.

The district may provide that the rates and charges for services and facilities furnished pursuant to this article may be collected with the water rates of the district, that all rates shall be billed upon the same bill and collected as one item, and that in the event of failure to pay the whole or any part of the bill, the district may discontinue any or all service for which the bill is rendered. This section shall not be construed to prohibit the collection of rates or charges by the district in any other lawful manner.

* * * *

71680.

A district may acquire, construct, and operate facilities for providing fire protection to the district and its inhabitants, including buildings, engines, hose, hose carts, or carriages, and other appliances and supplies for the full equipment of a fire company or department.

* * * *

71690.

A district may, within or without the district:

(a) Take real and personal property of every kind by grant, purchase, gift, device, or lease.

(b) Hold, use, enjoy, lease, or dispose of real and personal property of every kind.

71691.

A district may:

(a) Acquire, or contract to acquire, waterworks or a waterworks system, waters, water rights, lands, rights, and privileges.

(b) Construct, maintain, and operate conduits, pipelines, reservoirs, works, machinery, and other property useful or necessary to store, convey, supply, or otherwise make use of water for a waterworks plant or system for the benefit of the district.

(c) Complete, extend, add to, repair, or otherwise improve any waterworks or waterworks system acquired by the district.

(d) Carry on and conduct waterworks or a waterworks system.

71692.

A district may lease from any person, or public corporation or agency, with the privilege of purchasing or otherwise, all or any part of water storage, transporta-

tion, or distribution facilities, existing waterworks, or a waterworks system.

* * * *

71810.

A district may issue negotiable promissory notes pursuant to Sections 71811 and 71812. Such promissory notes shall bear interest at a rate not exceeding 6 percent per year. They shall be general obligations of the district payable from revenues and taxes in the same manner as bonds of the district.

* * * *

71853.

A district may issue revenue bonds for any purpose for which general obligation bonds may be issued. Such revenue bonds may be issued pursuant to the Revenue Bond Law of 1941 or any other law which by its terms is applicable to districts formed under this division.

* * * *

71860.

Whenever the board deems it necessary for the district to incur a bonded indebtedness for the acquisition, construction, completion, or repair of any or all improvements, works, or property mentioned in this division, the board shall, by resolution, so declare and call an election to be held in the district for the purpose of submitting to the voters thereof the proposition of incurring indebtedness by the issuance of bonds of the district.

* * * *

71940.

The board shall provide for holding the bond election on the day fixed in the resolution calling the election and in accordance with the provisions of the Elections

Code, so far as they shall be applicable, except as otherwise provided in this division.

* * * *

71950.

If from the bond election returns it appears that more than two-thirds of the votes cast in such election were in favor of and assented to the incurring of the indebtedness, the board may, by resolution, at such time or times as it deems proper, issue bonds of the district for the whole or any part of the amount of the indebtedness so authorized, and may from time to time provide for the issuance of such amounts as the necessity thereof may appear, until the full amount of such bonds authorized has been issued.

* * * *

71956.

The principal and interest on the bonds shall be payable in lawful money of the United States at the office of the treasurer of the district or such other place or places as may be designated, or at either place or places at the option of the holder of the bond.

* * * *

71971.

The proceeds from the sale of bonds shall be paid into the treasury of the district, placed to the credit of a special improvement fund, and expended only for the purpose for which the indebtedness was created. When such purpose has been accomplished, any moneys remaining in the special improvement fund may be transferred to the fund to be used for the payment of principal of and interest on the bonds.

* * * *

72090.

A district may cause taxes to be levied, in the manner provided in this part, for the purpose of paying any obligation of the district, including its formation expenses and any warrants issued therefor.

72091.

If the revenues of the district, or of any improvement district therein, are or in the judgment of the board will probably be inadequate for any cause to pay the principal of or interest on any bonded debt of the district, or any improvement district thereof, as it becomes due and also the amounts set forth in Section 71616, the board shall cause a tax to be levied, as provided in this part, sufficient to provide for such deficit and to pay the amount of such principal and interest that will become due before the proceeds of a tax levied at the next general tax levy will be available.

72092.

If, in the opinion of the board of a municipal water district, the corporate area of which has been included in or annexed to a metropolitan water district as a unit, the revenues of the municipal water district will be inadequate for any cause to pay the operating expense of such district, to provide for repairs and depreciation of works owned or operated by it, and to meet all of its obligations the board shall provide for the levy and collection of a tax, in the manner provided in this part, sufficient to raise the amount of money determined by the board to be necessary for the purpose of paying the operating expenses of such district, providing for repairs and depreciation of works owned or operated by it, and meeting all of its obligations.

72093.

The board shall determine the amounts necessary to be raised by taxation during the fiscal year and shall fix the rate or rates of tax to be levied which will raise the amounts of money required by the district.

* * * *

72098.

Taxes for the payment of a bonded debt and the interest thereon shall be a lien on all the property benefited thereby as stated in the resolution of the board declaring the necessity to incur the debt. All taxes for other purposes of the district shall be a lien on all the property in the district subject to the particular tax.

72099.

Liens for district taxes, whether for payment of a bonded indebtedness and the interest thereon or for other purposes, shall be of the same force and effect as other liens for taxes, and their collection may be enforced by the same means as provided for the enforcement of liens for state and county taxes.

* * * *

72160.

Proceedings for the exclusion of territory may be initiated by petition. The petition may consist of any number of separate instruments and shall be filed with the secretary.

72161.

The petition for exclusion shall be signed by voters residing within the area proposed to be excluded equal in number to at least 10 percent of the number of such votes voting for all candidates for the office of Governor at the last preceding gubernatorial election. If one or

more cities, or parts thereof, are included in the area proposed to be excluded, the petition shall, in addition, be signed by at least 10 percent of the voters of each such city, or part thereof, so voting at such election.

72162.

Petition for exclusion shall set forth and describe the boundaries of the area proposed to be excluded, shall state the reason for proposing such exclusion, and shall contain a prayer that such area be excluded from the district.

72163.

Within 10 days of the date of the filing of the petition for exclusion, the secretary shall examine the petition and determine whether it is signed by the requisite number of voters. Upon request of the secretary, the board shall authorize him to employ persons specially for this purpose, in addition to the persons regularly employed in his office, and shall provide for their compensation.

72164.

When the secretary has completed his examination of the petition for exclusion, he shall attach to it his certificate, properly dated, showing the result of such examination.

* * * *

72170.

If the secretary's certificate shows that the petition for exclusion is sufficient, the secretary shall present the petition to the board, without delay, for the purpose of determining the estimated costs and expenses of the exclusion proceedings.

72171.

Upon presentation of the petition for exclusion to the board, the board shall estimate the expenses and costs incident to the exclusion proceedings, including, but not limited to, advertising, engineering, and legal expenses and costs, and shall require the petitioners to deposit the sum so determined with the secretary. The sum so determined shall not exceed five hundred dollars ($500).

72172.

The petitioners shall deposit the sum determined by the board pursuant to Section 72171 within 30 days from the date of such determination. If the sum is not so deposited, no further action shall be taken on the petition.

* * * *

72174.

No more than five of the names attached to the petition for exclusion need appear in the publication of the petition and notice, but the number of signers shall be stated.

72175.

After an election for the exclusion of an area from the district is held, the sufficiency of the petition for exclusion shall not be subject to judicial review or be otherwise questioned.

* * * *

72190.

If the proceedings for exclusion have been initiated by petition, the petition may be granted by ordinance of the board.

72191.

If the proceedings have been initiated by resolution, the board shall hear all persons interested in the pro-

posed exclusion who appear at the hearing, which may be adjourned from time to time. At the conclusion of the hearing, the board may determine by ordinance that the area should be excluded from the district.

72192.

If an ordinance granting a petition for exclusion or determining that an area should be excluded is adopted by the board, the proposition of such exclusion shall be submitted to the voters within the area proposed to be excluded at an election called by the board and held, as provided in this article, within 70 days after the effective date of such ordinance.

* * * *

72194.

The notice of the exclusion election shall describe the boundaries of the area proposed to be excluded and shall designate such area by some appropriate name, or other words of identification, by which such area may be referred to and indicated upon the ballot to be used at the exclusion election.

72195.

The proposition submitted at the exclusion election shall be stated on the ballot substantially as follows:

"Shall . . . (giving the name or other designation of the area proposed to be excluded, as stated in the notice of the election) be excluded from . . . (name of district)?"

At the right of such proposition there shall be printed the words "Yes" and "No" with voting squares.

72196.

The board shall canvass the votes cast at the exclusion election and if the proposition is approved by a

majority of the voters voting thereon at such election, the president and the secretary shall certify that fact to the Secretary of State and to the county recorder of each affected county.

* * * *

72200.

Upon receipt of the certificate from the president and the secretary, the Secretary of State shall, within 10 days, issue his certificate reciting the passage of the ordinance and the exclusion of the area from the district.

* * * *

72202.

From and after the date of the Secretary of State's certificate, the area named therein is excluded from, and no longer forms a part of, the district.

72203.

The taxable property within the excluded area shall continue to be taxable by the district for the purpose of paying the bonded or other indebtedness of the district outstanding or contracted for at the time of the exclusion and until such bonded or other indebtedness is satisfied, to the same extent that such property would be taxable for such purpose if the exclusion had not occurred.

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APPENDIX "C"

Judgment of Superior Court.

This cause came on regularly for trial before the Court, the Honorable Thomas Coakley, Judge Presiding in Department 1 of the above entitled Court, sitting without a jury on the 5th day of December, 1961. Messrs. Surr & Hellyer, John B. Surr, Esq., and James Dilworth, Esq., appeared as attorneys for the Plaintiff; Stanford D. Herlick, County Counsel, and Robin S. Heyer, Deputy County Counsel, appeared as attorneys for the Defendants; and Messrs. Cosgrove, Cramer, Diether & Rindge; and J. D. Barnum, Jr., Esq., as attorneys for the Interveners; and the Court having made and signed its Pre-Trial Order herein and counsel for all of the parties having waived the provisions of Rule 8.7 of Rules Relating to Pre-Trial Conferences, the action proceeded to trial.

Plaintiff was called to the witness stand by his counsel to testify on his behalf, and was duly sworn and stated his name and address. Thereupon counsel for defendants and counsel for interveners objected to the introduction of evidence and moved the Court to determine the issue of constitutionality of the Municipal Water District Act of 1911, as amended, prior to any other issue in said action. The Court thereupon sustained said objection to the introduction of evidence and granted said motion, having concluded that said Act is constitutional, and that there remained no issue of fact to be tried.

Plaintiff then offered to prove, among other things, that neither plaintiff nor his land described in the complaint in said action would be in any way benefited by the formation of the proposed district mentioned in said

complaint, and that the value of said land would be depreciated by such formation.

The Court, having heard such offer and being fully advised in the premises directed that judgment be entered for Defendants and Interveners.

Now, Therefore, by reason of the law and the matters recited above it is hereby Ordered, Adjudged and Decreed that:

1. Plaintiff take nothing by this action except as specified below;
2. The preliminary injunction dated October 25, 1961 is hereby continued in effect and shall remain in effect until the happening of one of the following events, whichever first occurs, at which time said preliminary injunction shall automatically dissolve: (A) If no appeal is taken from the judgment within a period of 10 days from entry hereof. (B) Upon the date that the judgment herein becomes final. (C) In the event that proceedings pending to annex to any Municipal Water District any portion of the area described in the petition for formation of the Big Bear Municipal Water District are not voluntarily stayed and instead are carried beyond their present status by formal or official action, or in the event of any annexation proceedings involving said area being hereafter instituted.
3. The Defendants and the Interveners, and each of them, have judgment against the Plaintiff for their respective costs herein taxed as follows:

* * *

The Clerk is directed to enter this judgment.

Dated this 20th day of January, 1962.

Thomas Coakley
Judge of the Superior Court.

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IN THE

Supreme Court of the United States

October Term, 1963
No. 811

JOHN C. YRIBARNE,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, S. WESLEY BREAK, PAUL J. YOUNG, RICHARD G. MANLEY, NANCY E. SMITH, ROSS DANA, BUD FULLER, KARL AGAJANIAN, FRED SCHNABEL, JOHN SPENCER, CHESTER JANTZEN, and D. L. MILES,

Appellees.

MOTION TO DISMISS OR AFFIRM.

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IN THE

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October Term, 1963

No. .....

JOHN C. YRIBARNE,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, S. WESLEY BREAK, PAUL J. YOUNG, RICHARD G. MANLEY, NANCY E. SMITH, ROSS DANA, BUD FULLER, KARL AGAJANIAN, FRED SCHNABEL, JOHN SPENCER, CHESTER JANTZEN, and D. L. MILES,

Appellees.

MOTION TO DISMISS OR AFFIRM.

Appellees in the above-entitled case move to dismiss or affirm on the ground that (1) the matter has become moot and is no longer a case or controversy, and (2) that even if otherwise, the question presented is so unsubstantial as not to need further argument.

In support of this motion Appellees respectfully show this Court:

Opinion Below.

The appeal is taken from the judgment of the District Court of Appeal, State of California, Fourth Appellate District. The opinion is reported in 218 Adv.

Cal. App. 387, 32 Cal. Rptr. 847. When the opinion is printed in the official reports it will be in 218 Cal.App. 2d .....

Jurisdiction.

1. Appellant, plaintiff below,

> "brought a taxpayer's suit for an injunction to restrain the Defendants, the County of San Bernardino and its Board of Supervisors, [Appellees] from calling an election to be held within the boundaries of proposed Big Bear Municipal Water District, the formation of which to date has been sought by the Interveners, [also Appellees] the members of a Committee formed for that purpose." [Joint Statement of the Case, Clk.Tr. p. 103, lines 22 to 27, adopted and incorporated in the pre-trial order, Clk.Tr. p. 112, line 31, to p. 113, line 2.][1]

Section 526a of the California Code of Civil Procedure (see Appendix 1) authorizes a taxpayer to obtain an injunction restraining and preventing any illegal expenditure of, or waste or injury to, the property of any county. The Supreme Court of California has applied this section to authorize an injunction against holding an election where it appeared that the measure to be submitted to the popular vote would be "wholly void and inoperative." (*Harnett v. County of Sacramento*, 195 Cal. 676, 683.) In seeking the injunction Appellant relied on the *Harnett* case [Clk.Tr. p. 61] and attempted to show that the Municipal Water District *Act* of 1911,

---

[1]As Appellant correctly states:

> "In the California practice the pre-trial order supersedes the pleadings and 'controls the subsequent course of the case . . .' [California Rules of Court, Sec. 216]" (Appellant's Statement as to Jurisdiction, p. 8.)

as amended, (Stats. 1911, ch. 671, p. 1290 as amended; Deering's Water Uncodified Acts 1962 Ed. Act No. 5243; West's Water Code Appendix Section 20, hereinafter called the "Act") under which the proposed Big Bear Municipal Water District was being formed, was uncontitutional.[2] Specifically he claimed that the boundaries of the proposed District included his property, that his property would receive no benefit from its inclusion therein [Clk.Tr. p. 3], that the Act provided no means by which he could secure a hearing as to whether his properties would be benefited by the Proposed District [Clk.Tr. p. 3], that the Act unconstitutionally delegated power to determine the boundaries of the proposed District [Clk. Tr. p. 3], and to deprive plaintiff of his property without due process of law, contrary to Article I, Sec. 14 of the California Constitution and the Fourteenth Amendment to the Constitution of the United States [Clk.Tr. p. 3] and that the election would cause him damage as a taxpayer [Clk. Tr. p. 4].[3] These contentions were carried into the Statement of the Case [Clk. Tr. p. 104, lines 1-9] as were Appellees' contentions to the contrary [Clk.Tr. p. 104, lines 10-15].

---

[2]Italics here as elsewhere are ours unless otherwise noted.

[3]The Municipal Water District *Act* of 1911, as amended, was in force during all of the proceedings below until after the remittitur had issued from the District Court of Appeal. On September 20, 1963 the *Act* was codified as Division 20 of the Water Code, commencing with Section 71,000 and denominated the "Municipal Water District *Law* of 1911" (Stats. 1963, Chapter 156, as amended by Chapters 103, 457, 1151 and 1513). Section 73,000 of the Water Code repealed the *Act* and Section 73,001 added a saving clause. Appellant, in purported conformity with Rule 15 1(b)(v) of the Rules of this Court, has annexed to his Statement as to Jurisdiction certain sections of Division 20 of the Water Code, which, as we have said, were not in force until after judgment of the California Appellate Court had become final in the state courts.

2. The date of the judgment sought to be reviewed is July 17, 1963. It was entered the same day. On August 6, 1963 the District Court of Appeal denied Appellant's petition for rehearing. On August 16, 1963 the decision became final in the District Court of Appeal, subject to the granting of a hearing by the Supreme Court of California. On September 11, 1963 the Supreme Court of California denied a hearing and on September 16, 1963 the remittitur issued from the District Court of Appeal. On December 9, 1963 Appellant filed a Notice of Appeal to this Court in the District Court of Appeal, the court having possession of the record, and served the same on Appellees.

Although, as we have said, the action was originally commenced in the state court to enforce the taxpayer's right not to have public funds wasted by calling an election under a law claimed to be unconstitutional, the state courts met Appellant's challenge that the Act was unconstitutional and squarely decided, both in the Superior Court and in the District Court of Appeal that the Municipal Water District *Act* of 1911, as amended, was not unconstitutional or violative of plaintiff's rights under Article I, Sec. 14 of the California Constitution or the Fourteenth Amendment to the Constitution of the United States. Appellant relies on 28 U.S.C. Sec. 1257(2) as conferring jurisdiction of this appeal.

The District Court of Appeal affirmed the trial court's judgment and ordered a temporary restraining order dissolved. Thereafter, the District Court of Appeal denied Appellant's Application for a stay pending appeal to this Court. Mr. Justice Douglas of this Court on December 27, 1963 denied a similar application for

such a stay. The election was held (as admitted in the Statement as to Jurisdiction, p. 6), on January 7, 1964, the formation of the proposed District received a favorable vote of the electors, the election returns were canvassed and the incorporation papers were filed with the California Secretary of State.

3. The sole purpose of the action was to prevent the holding of the election, as Appellant admits in his "Application for a Stay in the Nature of an Injunction," dated December 11, 1963 [p. 9, lines 16-17] (hereinafter often abbreviated "App. for Stay"). As we have said, the election has been held. In such case, as Appellant asserted in its said Application for Stay,

> "[T]he jurisdiction of this court will be defeated . . ." [App. for Stay, p. 9, line 24.]

Nor did Appellant depart from this theory of the case in Appellant's Reply to Appellees' Opposition for Application for Stay (hereinafter abbreviated "Appellant's Reply"). There Appellant complained that

> "Not denied by appellees is the decisive fact that unless the proposed election is stayed pending this appeal, there will be nothing upon which the judgment of this court can operate by the time the decision is had." [Appellees' Reply, p. 2, lines 2-5.]

4. For the same reason none of the cases cited in Appellant's Statement as to Jurisdiction [p. 3] is in point. In none of them was the question moot. Moreover, all of these cases involved a district in the nature of an improvement or assessment district. None of them involved a quasi-municipal district such as the Big Bear Municipal Water District.

5. The state statute, whose validity was incidentally drawn in question below as a ground for Appellant's relief under Section 526a, California Code of Civil Procedure, is the California Municipal Water Distict *Act* of 1911 [Cal.Stats. 1911, ch. 671, p. 1290], as amended but not including the Codification of 1963 [Cal.Stats. 1963, Chs. 156, as amended by Chs. 163, 457, 1151 and 1513], being Division 20 of the California Water Code beginning with Section 71,000, expressly designated the "Municipal Water District *Law* of 1911."

Questions Presented.

1. Where an appellant brings a taxpayer's action for the sole purpose of preventing the holding of an election because, he claims, the act under which the election is to be held is unconstitutional and the election would be a waste of county funds, does the fact that the election has been held make his action moot therefore defeating the jurisdiction of this court, as Appellant contended to this court in December 1963?

2. But if, as Appellant now contends, the constitutional question is still involved, the federal question which should be sought to be reviewed is not, as stated by Appellant, but rather whether a California statute authorizing the creation of a quasi-municipal corporation, a political subdivision of the state, pursuant to California constitutional mandate, by majority vote, and containing no provisions to the effect that the consent of any particular inhabitant is necessary before his land can be included therein, is in violation of due process of law, as guaranteed by Amendment XIV to the Constitution of the United States?

ARGUMENT.

1. The Constitutional Question Is Moot and the Appeal Should Be Dismissed.

In his "Application for a Stay in the Nature of an Injunction," etc., dated December 11, 1963, Appellant says [p. 9, lines 16-25]:

> "The election—the prevention of the holding of which was the sole purpose of this action—if not restrained will be held on January 7, 1964. * * * Accordingly, absent an injunction, the appellate jurisdiction of this Court will be defeated and the appellant will lose the possibility of garnering the fruits of a successful appeal."

The Application for Stay was denied by Mr. Justice Douglas on December 27, 1963. Thereafter, the election was held and a large majority of the voters (1258 for; 438 against) voted in favor of forming Big Bear Municipal Water District. The position taken by Appellant in his Application for a Stay, above quoted, is directly contrary to the position he now takes in his Statement as to Jurisdiction. Appellant admits

> "[T]he question of an injunction against holding it [the election] is very likely moot" [Statement as to Juris. p. 6].

Nevertheless Appellant continues, saying:

> "But that does not dispose of the case as a whole or of the constitutional question involved in it." [Statement as to Juris. p. 6].

The latter contention is directly contrary to his direct statements in his said Application for Stay that:

> "If it [the election] is held before this court can finally act on the within appeal * * * there

> will obviously be no subject-matter upon which a judgment of this Court could operate." [Application for Stay p. 2, lines 27-30]

and that [p. 9]:

> "[A]bsent an injunction, the appellate jurisdiction of this court will be defeated."

and contrary to his statement in Appellant's Reply [p. 2] that

> "[U]nless the proposed election is stayed pending this appeal there will be nothing upon which the judgment of this court can operate by the time decision is had."

Assuming, in *arguendo*, that the Act was unconstitutional as to Appellant, what relief could the Court award him under his pleadings? Once the election has been held, as it was,

> "In a legal sense the judgment could not be executed, and amounts in fact to no more than the expression of opinion upon the validity of the acts in question." (*Muskrat v. United States*, 219 U.S. 346 remanding with directions to dismiss for want of jurisdiction.)

Appellant correctly said in his Application for a Stay that "the prevention of the holding of [the election] was the sole purpose of this action" (App. for Stay, p. 9 lines 16 and 17) and that is indeed exactly what the record shows. There was no allegation of any specific money damage to Appellant because of the inclusion of his property in the proposed municipal water district. Nor did he seek an injunction to prevent the collection of District taxes. All the allegations [Clk. Tr. p. 3] were leading up to his contention that the Act was unconstitutional and any election for the formation of the

Big Bear Municipal Water District would be a waste of public funds. The gist of his complaint is found in Paragraph IX [Clk. Tr. p. 41] that the cost of the election will exceed $1,500.00 and will be borne by the County of San Bernardino, of which plaintiff is a taxpayer.

The pre-trial order which Appellant says controls the subsequent course of the case is found in the record [Clk.Tr. 112-114]. It determined that:

> "1. The nature of the case is set forth in the joint 'Statement of the Case' and 'Joint Written Statement of the Matters Agreed Upon' signed by the parties filed herein and hereby incorporated in this order." [Clk.Tr. p. 112, line 31 to p. 113, line 3.]

The "Statement of the Case" and the "Joint Written Statement of the Matters Agreed Upon" signed by all the parties and incorporated by the trial court in its pretrial order are found in Clk. Tr. p. 103-105. The first paragraph of the Statement of the Case already quoted herein shows that, as Appellant stated to Mr. Justice Douglas: "The election—the prevention of the holding of which was the sole purpose of this action" [App. for Stay, p. 9, lines 16-18].

It is true that Appellant contended in its Statement of Contentions of Law the same contentions as to the unconstitutionality of the Act he had made in his complaint. [Clk.Tr. p. 102, lines 11-29; p. 104, lines 1-9] and that Appellees' legal contentions were to the contrary [Clk.Tr. p. 104, lines 9-14], but it must always be remembered that Appellant's contention was still a build-up for his main point that the County of San Bernar-

dino was wasting public funds in calling an election under the Municipal Water District Act of 1911 because the Act was unconstitutional and that Appellees were denying this contention.

As the sole purpose of the action was to prevent holding the election, and as the election has been held, therefore the action is moot and the attempted appeal should be dismissed. (See Robertson & Kirkham's Jurisdiction of the Supreme Court of the United States by Wolfson and Kurland, (1951 Ed.) pages 518-520.)

2. In Any Event Appellant's Appeal Does Not Present a Substantial Federal Question.

Appellant's statement of Questions Presented treats a municipal water district as a "special improvement district" and speaks of subjecting Appellant's land "to taxation and assessment to pay for the special improvements without any hearing" as to whether the land is or will be benefited by the improvement [State. as to Juris. pp. 4-5].

The opinion of the District Court of Appeal and the California authorities therein quoted demonstrate that a municipal water district formed under the Act is *not* a "special improvement district"; does *not* subject the owner's land "to taxation and assessment" to pay for special improvements, but is a quasi-municipal corporation carrying on governmental functions and utilitarian objects of duly incorporated cities and towns.

On March 28, 1911 the Legislature proposed to the people an amendment to the State Constitution amending Section 19 of Article XI (see Appendix 2). The proposed amendment provided that any "municipal corporation" may establish and operate public works for

supplying its inhabitants with light, water, power, heat, transportation, telephone service and other means of communication.

On May 1, 1911 the Legislature adopted the Act providing for the formation of municipal water districts (Stats. 1911, ch. 671, p. 1290).

On October 10, 1911 the constitutional amendment was adopted by the people.

The constitutionality of the Act as amended came before the Supreme Court of California in November 1917 in the case of *Henshaw v. Foster*, 176 Cal. 507. It was there held constitutional against the same claims that are here made by Appellant. The Supreme Court, speaking of the Act as amended, said:

> "By the law and under its sanctions the people of one or more municipalities, with the adjacent territory, may unite for the joint benefit of all *forming a municipal corporation* through which they may accomplish that which it would be impossible for any one of the constituent municipal or suburban units to perform."
>
> 176 Cal. 511.

In *Morrison v. Smith Bros., Inc.: East Bay Municipal Utility District*, 211 Cal. 36, the Supreme Court of California, after discussing irrigation, reclamation, and drainage districts (211 Cal. 40-41), and quoting in part from Article XI, Section 19 of the California Constitution, said:

> "That the term 'municipal corporation', as above used, was not intended to be limited to municipal corporations proper, as defined in this opinion, but was intended to include *quasi*-municipal corpora-

tions similar to respondent, is well settled. Immediately after the adoption of the above constitutional provision the legislature amended the Municipal Water District Act of 1911 (Stats. 1911, p. 1290, as amended Stats. 1911, Ex.Sess., p. 92), which permitted the creation of districts similar in many respects to respondent."

211 Cal. 41.

The court then cited *Henshaw v. Foster (supra)* and quoted the language we have above quoted, italicizing the language "forming a municipal corporation." (211 Cal. 41.)

The Supreme Court of California then said:

"Thus, from the very first, the courts have recognized that the above constitutional provision has created a new type of public corporation very similar to municipal corporations proper, but radically different from the state agencies above discussed."

211 Cal. 42.

Later on in *Henshaw v. Foster, supra,* the Supreme Court made the following distinction (which we earnestly contend is controlling of the case at bar) between an assessment district, as such, and a district organized as a public corporation insofar as the question of when a hearing must be held under the Act:

"An important distinction is to be observed between a proceeding which has for its purpose the making of a local public improvement and one for the creation of a district having extensive powers. As Mr. Justice Shaw said, in delivering the opinion in *Wilcox v. Engebretsen,* 160 Cal. 288-293, [116 Pac. 750,752]: 'Another distinction is to be

made between the proceedings of a board or council acting in pursuance of some delegated legislative *authority in creating or extending a political subdivision of the State, as a county or a city, a proceeding which does not directly affect private property, and proceedings to open, grade, regrade, or improve a street, which do directly charge or affect private property.* (*People v. Ontario*, 148 Cal. 632, 634, [84 Pac.205]; *People v. Loyalton*, 147 Cal. 779, [82 Pac. 620]; *Dean v. Davis*, 51 Cal. 412; *In re Madera Irr. Dist.*, 92 Cal. 323, [27 Am.St. Rep. 106, 14 L.R.A. 755, 28 Pac. 272, 675].) * * *'"

176 Cal. 513-514.

The opinion of the District Court of Appeal (Appendix A to Appellant's Statement as to Jurisdiction) makes plain this distinction between a quasi-municipal corporation and irrigation, reclamation and assessment districts. The District Court of Appeal quoted at length from *In re Orosi Public Utility District*, 196 Cal. 43, which upheld the validity of that organization under the Public Utility District Act (Stats. 1921, ch. 560, p. 906, in its original form [Opinion App. A, pp. 7-14]. At pages 10 and 11 of Appendix A the District Court of Appeal quoted from *In re Orosi Public Utility District*, 196 Cal. 57,58, thereby likening a public utility district to a municipal water district as follows:

"It is quite apparent to us that the legislature had in view such association of the people living in the outlying districts, when it enacted the statute providing for the formation of public utility districts in the unincorporated territory of the state. It thereby provided for the creation of public

agencies or *quasi*-municipal corporations, the declared purpose of the act being to extend to the inhabitants of such districts, when properly organized, advantages in the use and benefit of certain utilities which they might not be able to obtain in any other way, and which, from common experience, we know tend to promote the general welfare of the people of the state. * * *."

* * *

"Any tax, therefore, levied and collected for the purpose of supplying such municipal capital is not a tax or assessment on property directly benefited by the construction of some local improvement, but is a general tax levied just as, and for the same purpose that, any general municipal tax is imposed for carrying on the governmental functions and utilitarian objects of duly incorporated cities or towns."

That a municipal water district is given powers similar to those of a municipality is altogether apparent by a review of some of the provisions of Section 12 of the Act (See Appendix 3). The district is authorized to acquire water works systems; to construct, improve and operate public recreational facilities appurtenant to any water reservoir; to lease water storage; to supply and deliver district water to publicly owned and operated golf courses and other publicly owned and operated recreational facilities and public schools; to restrict the use of district water during any emergency caused by drought; to purify and salvage sewage and storm waters and to operate facilities for the treatment and disposal of sewage; and to acquire and construct and operate facilities for providing fire protection to the district.

California law authorizes water district boards of directors to fix the rates and district taxes (Sec. 24 of the Act, codified as Water Code Section 92093 App. B, p. 31; Revenue & Taxation Code, Sec. 2151; Gov. Code, Sec. 29040, see App. 4) and provides for a hearing on public notice of the time at which any taxpayer may appear and be heard. (Gov. Code Sec. 29080, App. 4.) In addition the California Constitution provides that the board of supervisors of the several counties of the state shall constitute boards of equalization for their respective counties whose duty is to equalize the valuation of the taxable property in the county for the purposes of taxation (Cal. Const. Article XIII, sec. 9, Appendix 4).

Appellant despite the facts appearing on the face of the Act and its codification (Appendix 3), of which the California courts, and this Court on appeal will take judicial notice, alleges that his property will not receive "any other benefit from inclusion in the Proposed District" [Clk.Tr. p. 3, line 9]. In *Santa Barbara Water Agency v. All Persons*, 47 Cal.2d 699, the Supreme Court of California pointed out that the question of benefits to land within a district had been exhaustively considered in *Los Angeles County Flood Control District v. Hamilton*, 177 Cal. 119 and referring to that case said:

> "In referring to numerous cases involving problems closely related to the present one, the court concluded that an 'examination of these cases will show that the courts have regarded an incidental or indirect benefit as sufficient to justify the imposition of a part of the burden of the improvement. Such indirect benefit may result from the improvement of neighboring and surrounding land,

and the consequent increase in the value of all land within the district. * * *.'"

47 Cal.2d 712.

Many other California Supreme Court cases directly in point are cited and quoted further in the Opinion of the District Court of Appeal, but we do not consider it necessary to burden this court with a repetition of these quotations.

In the light of the California decisions which we have discussed we must disagree with Appellant's statement of Questions Presented. The cases which Appellant cites in support of the "Substantiality of the Question" [Statement as to Jurisdiction, pp. 11 and 12] do not involve quasi-municipal districts such as the kind discussed in the Opinion; but involve special assessment districts as follows:

Chesebro v. Los Angeles Flood Control District, 306 U.S. 459, strongly relied on by Appellant [Statement as to Jurisdiction, p. 11] involved the power of an administrative board "to levy special assessments on his land" (306 U.S. 460). *Browning v. Hooper*, 269 U.S. 396, involved an assessment for a road district. *Norwood v. Baker*, 172 U.S. 269, involved special assessments upon private property to meet the cost of public improvements (172 U.S. 278). *Embree v. Kansas Road District*, 240 U.S. 242, involved a taxing district—a road improvement district.

Myles Salt Company v. Iberia Drainage District, 239 U.S. 478, involved a drainage district. That case is readily distinguishable and the rule is not applicable here. The Supreme Court of California has distinguished the *Myles* case in *People v. City of Palm Springs*, 51 Cal.2d 38, in which, sustaining a judgment for the City, which

had annexed uninhabited territory, said of the *Myles* case:

> "Special taxing districts can confer but one readily ascertainable benefit peculiarly advantageous to the property within the district and if it does not accrue to particular land, an assessment of that land to finance the improvements amounts to a taking of property without due process of law. But the rule is otherwise with respect to municipal corporations whose advantages are general and varied, including 'the legally presumed intangible benefits resulting from the privilege of being part of an organized community.'"
>
> 51 Cal.2d 47-48.

The last case cited by Appellant in support of substantiality is *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112. This is the same case mentioned in *In re Orosi Public Utility District, supra*, 196 Cal. 43 quoted by the Opinion [Statement as to Jurisdiction, Appendix A, page 9] in which the Supreme Court said in effect that in cases where *Fallbrook Irrigation District* is applicable to assessment districts it has been constantly adhered to by the California courts, but it "does not apply to every kind of public or *quasi*-public corporation" (196 Cal. 51).

Appellant contends [Statement as to Jurisdiction, pp. 13 and 14] that the Act, by giving the power to define the boundaries to private persons who initiate the proceedings "Control over Appellant's property is thus delegated to private persons." [State. as to Juris. p. 14.] This question of delegation of power has been held by this court not to present a substantial federal question. *Ohio v. Akron Park District*, 281 U.S. 74, 79; *Neblett v. Carpenter*, 305 U.S. 297, at 302.

Considering the actual question pres
there can be no doubt that a substanti
tion is not involved.

Conclusion.

We respectfully submit that Appel
moot, and for that reason the appeal
missed. But in any event we submit
lant's appeal does not present a substant
tion and on that ground the appeal sho
or dismissed.

Respectfully submitted,

JOHN N. CRAMI
Attorney for

Of Counsel:

STANFORD D. HERLICK, *County C*
JOHN D. WATT, *Deputy County C*
J. D. BARNUM, JR.

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that the Appel-
ial federal ques-
uld be affirmed

ER,
Appellees.

ounsel.
ounsel.

APPENDIX 1.

SECTION 526a CALIFORNIA CODE OF CIVIL PROCEDURE.

"526*a*. An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; *provided*, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities."

Stats. 1911 p. 87.

APPENDIX 2.

SECTION 19 OF ARTICLE XI OF THE CALIFORNIA CONSTITUTION, AMENDMENT ADOPTED OCTOBER 10, 1911.

"Sec. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; *provided*, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. [*Amendment adopted October 10, 1911.*]

Stats. 1911 Part Two p. 2180.

APPENDIX 3.

CERTAIN SUBSECTIONS OF SECTION 12 OF THE MUNICIPAL WATER DISTRICT ACT OF 1911 AS AMENDED STATS. 1961 CHAPTER 669 PAGE 1887 ET SEQ., DEFINING THE POWERS OF A DISTRICT:

"5. To acquire, or contract to acquire, waterworks or a waterworks system, waters, water rights, lands, rights and privileges and construct, maintain and operate conduits, pipelines, reservoirs, works, machinery and other property useful or necessary to store, convey, supply or otherwise make use of water for a waterworks plant or system for the benefit of the district, and to complete, extend, add to, repair, or otherwise improve any waterworks or waterworks system acquired by it as herein authorized;"

Codified 1963 Water Code Section 71691 Appellant's Appendix B page 27.

"5a. To construct, maintain, improve and operate public recreational facilities appurtenant to any water reservoir operated or contracted to be operated by the district, and to provide by ordinance regulations binding upon all persons to govern the use of such facilities, including regulations imposing reasonable charges for the use thereof. Violation of any such regulation shall be a misdemeanor;"

Codified 1963 Water Code Section 71660 Appellant's Appendix B page 25.

"6. To lease of and from any person, firm or public or private corporation, or public agency, with the privilege of purchasing or otherwise, all or any part of water storage, transportation or distribution facilities,

existing waterworks or a waterworks system, and to carry on and conduct waterworks or a waterworks system; also to sell water under the control of the district to cities, and to other public corporations and public agencies within the district, and to the inhabitants of such cities and of other territory within the district, and to persons, corporations, and other private agencies within the district for use within said district without any preference, and it may, whenever the board shall find that there is a surplus of water above that which may be required by such consumers within said district, sell or otherwise dispose of such surplus water to any persons, firms, public or private corporations or public agencies or other consumers;"

Codified 1963 Water Code Sections 71611, 71612 [Appellant's Appendix B page 25] 71692 [Appellant's Appendix B page 27].

"6a. To supply and deliver district water to publicly owned and operated golf courses and other publicly owned and operated recreational facilities and to public schools, school districts and public school properties, and to fix and establish special rates, terms and conditions for the use and sale of water for each of these purposes; provided, however, that this provision shall not be construed to indicate legislative intent either for or against the existence of any power of the district to furnish water to other persons, firms or corporations at just and reasonable rates;"

Codified 1963 Water Code Section 71613.

* * * * *

"9a. To restrict the use of district water during any emergency caused by drought, or other threatened or ex-

isting water shortage, and to prohibit the wastage of district water or the use of district water during such periods, for any purpose other than household uses or such other restricted uses as may be determined to be necessary by the district; to prohibit use of such water during such periods for specific uses which the district may from time to time find to be nonessential;"

Codified 1963 Water Code Section 71640.

* * * * *

"13. To acquire, control, distribute, store, spread, sink, treat, purify, reclaim, recapture, and salvage any water, including sewage and storm waters, for the beneficial use or uses of the district or its inhabitants or the owners of rights to water therein;"

Codified 1963 Water Code Section 71610 [Appellant's Appendix B page 24].

* * * * *

"19. To acquire, construct, and operate facilities for the collection, treatment and disposal of sewage, waste and storm water of the district and its inhabitants and may prescribe, revise and collect rates or other charges for the services and facilities furnished pursuant to this subdivision. The revenues from such rates and charges may be used to pay the operating and maintenance expenses of such facilities, provide a reasonable surplus for improvements, extensions and enlargements, pay the interest on any bonded debt for such facilities and provide a sinking or other fund for the payment of the principal of such debt as it may become due. The district may provide that such rates and charges may be collected with the water rates of the district and that all rates shall be billed upon the

same bill and collected as one item, and that in the event of failure to pay the whole or any part thereof, the district may discontinue any and all service for which such bill is rendered, but this provision shall not be construed to prohibit the collection of rates or charges by the district in any other lawful manner. The second sentence of Section 33 of this act, shall not be applicable to this subdivision;"

Codified 1963 Water Code Section 71670, 71672 [Appellant's Appendix B page 26 and 71673].

"20. To acquire, construct, and operate facilities for providing fire protection to the district and its inhabitants, including buildings, engines, hose, hose carts, or carriages, and other appliances and supplies for the full equipment of a fire company or department. * * *"

Codified 1963 Water Code Section 71680 [Appellant's Appendix B p. 27].

APPENDIX 4.

PROVISIONS OF THE CODES AND CONSTITUTION RESPECTING THE LEVYING AND EQUALIZATION OF TAXES.

Excerpt From Section 24 of the Municipal Water District Act of 1911, Stats. 1911, page 1290, as Amended Stats. 1955, page 2400:

"Sec. 24. The board of directors shall determine the amounts necessary to be raised by taxation during the fiscal year and shall fix the rate or rates of tax to be levied which will raise the amounts of money required by the district. * * *."

Codified 1963 Water Code Section No. 72093 [Appellant's App. B, p. 31].

Revenue and Taxation Code Section 2151:

"The board of supervisors shall fix the rates of county and district taxes and shall levy the State, county, and district taxes as provided by law."

Government Code Sections as Amended Stats. 1963 Chapter 1209:

"29040. On or before June 10th of each year, as the board [of supervisors] directs, each official or person in charge of any budget unit shall file with the auditor an itemized estimate of anticipated revenues and proposed expenditures. If the board directs, the estimates shall also be filed with the administrative officer."

"29080. On or before August 20th of each year, as the board [of supervisors] directs, it shall meet at the time and place designated in the published notice, at which meeting any taxpayer may appear and be

heard regarding the increase, decrease or omission of any item in the proposed budget or for the inclusion of additional items. All proposals for the increase or the inclusion of additional items shall be submitted in writing to the clerk of the board before the close of the public hearing."

Article XIII Section 9 California Constitution:

"Sec. 9. A State Board of Equalization, consisting of four members, shall be elected by the qualified electors of their respective districts, at each gubernatorial election, whose term of office shall be for four years; whose duty it shall be ... equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation. The Controller of State shall be ex officio a member of the board. The board of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe, as to the county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in

said roll; provided, that no board of equalization shall raise any mortgage, deed of trust, contract, or other obligation by which a debt is secured, money, or solvent credits, above its face value. The present State Board of Equalization shall continue in office until their successors, as herein provided for, shall be elected and shall qualify. The Legislature shall have power to redistrict the State into four districts as nearly equal in population as practical, and to provide for the elections of members of said Board of Equalization. [*As amended November 8, 1960.*]"

Stats. 1961 p. ixxxviii.

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IN THE

Supreme Court of the United States

October Term, 1963
No. 811

JOHN C. YRIBARNE,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, S. WESLEY BREAK, PAUL J. YOUNG, RICHARD G. MANLEY, NANCY E. SMITH, ROSS DANA, BUD FULLER, KARL AGAJANIAN, FRED SCHNABEL, JOHN SPENCER, CHESTER JANTZEN, and D. L. MILES,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Preliminary Statement.

But two points are made by appellees in support of their motion to dismiss or affirm.[1] They are, that the case is moot; and the federal question is not substantial. Each of these points was anticipated in our Statement As To Jurisdiction, pages 6-8, 11-15. We do not here repeat but merely supplement what was there said.

The motion was received by appellant on March 3, 1964.

[1] As this is an appeal from a judgment of a state, not a federal court, the provisions of Rule 16(c) relating to affirmance for want of substantiality are inapplicable.

ARGUMENT.

I.

The Case Is Not Moot.

The question whether to award an injunction against the holding of an election to form the Big Bear Municipal Water District, is indeed moot, since the election has been held. As appellees correctly point out, we have not hidden from the court our view that that is so. [See, *e.g., Statement As To Jurisdiction*, p. 6.] That injunction, however, was only one of several forms of relief that, on the facts made out below, could have been given appellant. The fact that the question of awarding this one form of relief is moot does not make moot the *case* in which that relief was sought and in which other appropriate and effective relief may still be awarded appellant. The judgment in the trial court was not merely that an injunction against the election be denied. It was that appellant "take nothing." [Clk. Tr. p. 196, lines 21-22.] The case is not moot because the question whether the district could be constitutionally formed with appellant's lands included in it without provision for a hearing on benefits, is still in controversy between the parties, has not been finally adjudicated and, if adjudicated in appellant's favor, will justify awarding to him, in this very action, appropriate relief in respect of the inclusion of his lands.

A case is not moot when the question in controversy is still open, and effective relief in respect of it can be given. [*Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42-43; *Hecht Company v. Bowles*, 321 U.S. 321, 327-328; *Porter v. Lee*, 328 U.S. 246, 251-252; *Walling v. Reuter, Inc.*, 321 U.S. 671, 674; *Porter v. Merhar*, 6 Cir., 160 F. 2d 397, 402; and see also the cases

cited, *Statement As To Jurisdiction*, pp. 7-8.] We have here ". . . 'an actual controversy, and adverse interests,' . . . with a 'subject-matter on which the judgment of the court can operate' . . ." [*Walling v. Helmerich & Payne, Inc., supra*, 323 U.S. at 43.] These are the elements of a live, not a moot case; and especially so when the burden against which relief is sought is a continuing or recurring one, as in the instant case is the future liability to taxation for the needs of the improvement district. [*Local 74 v. N.L.R.B.*, 341 U.S. 707, 715; *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334; *United States v. Aluminum Co. of America*, 2 Cir., 148 F. 2d 416, 448; *Perma-Maid Co. v. Fed. Trade Com.*, 6 Cir., 121 F. 2d 282, 284.]

At the bottom of appellant's claim below was the contention that his lands could not be consitutionally included in the proposed district without some procedure by which he could be heard as to benefit or lack of it to his lands. [*Statement As To Jurisdiction*, pp. 5-6.] That claim makes up the federal question here sought to be reviewed, and for the review of which an appeal lies. [*Statement As To Jurisdiction*, pp. 1-2, 8-11.] Should the question be decided here in his favor, relief can be awarded him that will appropriately protect him against the burdens ensuing upon inclusion in the district and from which it was his ultimate purpose to protect himself. Stopping the election was but a means of achieving that purpose, not an end in and of itself.

That purpose can still be achieved in the instant action. The state court's power to award effective relief exists and the parties necessary to consummation of the purpose are before the court. For example, as effective a method of relief as stopping the election would have been is enjoining the collection of taxes on appel-

lant's land. Taxes for the district are levied by the County Board of Supervisors; all county officers charged with tax-collection duties have the same duties in respect of district taxes as they have for the county. [*Cal. Water Code*, (1963) secs. 72095, 72097.[2]] That means that collection is in the hands and control of the county. The county is a party to this action, as is its governing body, the Board of Supervisors. They may be enjoined from levying or collecting any district taxes on appellant's land.[3]

The fact that such relief was not specifically prayed for is beside the point. Appellant is entitled to have in this case *any* relief open on the facts proved. [*Buxbom v. Smith*, 23 Cal. 2d 535, 542-543, 145 P. 2d 305, 308; *Singleton v. Perry*, 45 Cal. 2d 489, 499, 289 P. 2d 794, 800 and cases there cited. *Booker v. Aitken*, 140 Cal. 471, 473, 74 Pac. 11; *Cal. Code of Civil Procedure*, sec. 580.] The right to such relief is not limited by the fact that there was only a prayer for an injunction against the election.[4] Indeed a prayer was

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[2]All California statutes not printed in Appendix "B" to the Statement as to Jurisdiction are printed in the appendix to this brief.

[3]Even if additional parties or averments are necessary or desirable, California's liberal amendment policy would make it easy to bring them in. [*Cal. Code of Civil Procedure*, secs. 389, 473.] "The policy of great liberality in permitting amendments at any stage of the proceeding was declared at an early date and has been repeatedly restated." [Witkin, *California Procedure*, vol. 2, p. 1605, and cases there cited.]

[4]There was, however, a prayer for an injunction "as to any action or proceeding based upon said petition [to form the district], and for such other relief as the Court shall deem proper." [Clk. Tr., p. 4, lines 26-28.] A general prayer of that kind "is a sufficient foundation for any relief appropriate to the facts stated . . ." [*Rogers Dev. Co. v. So. Cal. etc. Inv. Co.*, 159 Cal. 735, 741, 115 Pac. 934, 936. See, *United States v. Ward Baking Co.*, ... U.S. ...., 24 C. C. H. Sup. Ct. Bull. 815, 821 (n. 3)]

not even necessary; and, when one was supplied, it did not become a part of the cause of action pleaded. [Witkin, *California Procedure*, vol. 2, p. 1216; *Berg v. Investors etc. Loan Co.*, 207 Cal. App. 2d 808, 815, 24 Cal. Rptr. 701, 705; *Miller v. Superior Court*, 59 Cal. App. 334, 338-339, 210 Pac. 832, 834.]

Appellees' presentation ignores entirely this rule of California practice. It ignores as well the significant distinction between the whole and one of its parts, between the case as an entirety and one of the questions in it. When regard is had to these matters it becomes evident that the essential controversy between the parties in the instant case is very much alive and that effective relief in respect of it may still be given. It is this fact that keeps the case from being moot, notwithstanding the mootness of one form of possible relief. A moot case, as this case is not, is one in which a reversal will do the appellant no good because, as the consequence of destruction of the subject matter, or of some other intervening cause, effective relief cannot be given him in the case. [*Ex parte Baez*, 177 U.S. 378, 390; *St. Pierre v. United States*, 319 U.S. 41, 42.] Effective relief can be given in the case at bar, as is shown above.

This is a California state court case. If it is not moot in the courts of that state, it should not be held moot here. In the California practice—and pretty much for the reasons above advanced—this case is not moot. Illustrative California decisions to that point are these:

> *United Real Estate etc. Co. v. Barnes*, 157 Cal. 515, 516, 108 Pac. 306—in an action to enjoin a sale of land for a delinquent assessment, the assessment being challenged on ground of fraud in adjusting the boundaries of the assessment dis-

trict, *held* the action was not rendered moot by payment of the assessment under protest to prevent the sale, because "the claim of the plaintiff to recover the money paid under protest involves the same questions that are involved in this appeal; and it [plaintiff] claims that in this action, if the judgment should be reversed, the superior court—as a court of equity—should order the defendant to refund the money paid under protest . . ."

People v. Hawley, 207 Cal. 395, 407, 279 Pac. 136, 141—an action to abate a nuisance on defendant's land, *held* not rendered moot by lapse of defendant's rights to the land in question, because the court was not "prepared to say that a reversal of the judgment would prove fruitless . . ."

Newcomb v. Newport Beach, 7 Cal. 2d 393, 402, 60 P. 2d 825, 829—an action to quiet title to tidelands was not rendered moot by dredging that caused the lands to be completely submerged, as title to the lands and the right of the defendant to make changes and improvements on the land were the issues involved in the action, and those issues were still alive.

Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 538-541, 145 P. 2d 49, 84-85—in an action to enjoin future trespasses upon a mine and to recover damages for an existing trespass, *held* that the action was not rendered moot by changed conditions intervening pendente lite, which made the mine inoperable and thus made an injunction no longer necessary. The court

> said: ". . . the ownership of the vein was relevant to the action for damages, as well as to the injunction, . . . Furthermore, apart from the cause of action for damages, the fact that the plaintiff does not immediately need injunctive relief in the form awarded by the decree, by reason of the closing of the mines, does not render moot the question of ownership of the disputed vein, to which both parties claim title . . . It is true that the ownership of that vein was incidental to the right to injunction . . . The trial court has decided the issue of ownership in plaintiff's favor. The trial was devoted largely to that issue . . . The adjudication of ownership in favor of plaintiff is not to be cast aside because facts arising pending appeal remove the immediate need for injunctive relief. Plaintiff is not to be deprived of that adjudication by reason of facts occurring after judgment because he brought his action in the form of a suit for injunction, rather than a quiet title suit."

Appellant is entitled to review, by this Court, of the constitutional question incorrectly decided below. That question is not moot because an election-injunction is no longer needed. An appropriate direction from this Court in respect of that question will open the way to other relief that is available in this action in the state court, and which will effectively accomplish the basic purpose for which the action was brought.

II.

The Question Raised Is Substantial.

1. The gist of appellees' contention that the federal question presented in the instant case is not substantial is simply that in California a water district of the sort here involved is called a "quasi-municipal corporation" and so, is not within the ambit of the rule upon which we rely. That rule is that land cannot be included in a special improvement district without there being accorded to its owner an opportunity to be heard on the question of benefit from the improvement. Of course, the reality of a given situation is not changed or dissipated by a name, and constitutional limitations cannot be avoided by the simple expedient of a christening. If the instant district is in fact one of the kind to which the indicated rule is applied, it is not taken out of it, nor is the violation of appellant's constitutional rights eliminated, by pinning an innocuous label on the taxing entity. A "state cannot foreclose the exercise of constitutional rights by mere labels . . ." [*N.A.A.C.P. v. Button*, 371 U.S. 415, 429; *New York Times v. Sullivan* (Mar. 9, 1964) ..... U.S. ....., 24 C.C.H. Sup. Ct. Bull. 845, 858, N.Y. Times, Mar. 10, 1964, p. 22, col. 7.]

The Big Bear Municipal Water District, as we shall show in a moment, will be seen, when viewed in the light of what it is and is not empowered to do, to be precisely the kind of a district to which this Court's decisions cited at pages 11-12 of the Statement As To Jurisdiction apply. That being so, the failure, indeed the refusal, of the state court to follow those decisions and the consequent denial to appellant of a constitutional right that this Court has clearly recognized and

vindicated, makes the question a substantial one. [See, *Herzog v. United States*, 99 L. Ed. 1299, 1301 (per Douglas, J., in chambers).]

Appellees' argument rests entirely on decisions of the state court. None from this Court is cited by them. On the other hand, a claim of denial of federal constitutional right is made by appellant. Whether that claim is good is a question for this Court to decide; and in arriving at that decision the Court will not be put off by any niceties of terminology in which the state court may have indulged, any more than it will by a state court's over-exacting insistence upon meticulous pleading. [See, *Brown v. Western Railway*, 338 U.S. 294, 299.] It will decide for itself, independently of the state court and by its own examination of the records, whether the federal right has *in fact* been infringed. [*Edward v. South Carolina*, 372 U.S. 229, 235, and cases there cited.] ". . . Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . ." [*Davis v. Wechsler*, 263 U.S. 22, 24.] It is within this Court's "province to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect . . ." [*Ward v. Love County*, 253 U.S. 17, 22. See also: *First Nat. Bank v. Anderson*, 269 U.S. 341, 346; *Union Pac. R.R. Co. v. Pub. Service Comm.*, 248 U.S. 67, 69-70; *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176-177.]

Actually, the argument advanced by appellees demonstrates the substantiality of the question. The decision below in this cause would seem *prima facie* to have

been rendered in the teeth of the precedents from this Court that we have cited. [*Statement As To Jurisdiction*, pp. 11-12.] To avoid the effect of those precedents it is necessary for appellees to argue that the district is one rather than another kind of entity: that it is not an assessment or special improvement district but a quasi-municipal corporation. It is not denied that if it is the former, provision for a hearing on benefits is constitutionally necessary. Determination whether the district is the kind of an entity appellees say it is, or of the kind to which the cited decisions apply, will require careful analysis of a long and complex statute—the California Municipal Water District Act [see, *Statement As To Jurisdiction*, p. 4, and Appendix "B" *passim*]—and critical examination and study of a considerable number of decisions, state and federal. To the proper execution of such a task, briefing, oral argument and a plenary hearing are needed. Thus, the question is shown to be substantial.

Even a cursory look at the California decisions put forward by appellees [*Motion to Dismiss Or Affirm*, pp. 11-13] will underscore the substantiality and importance of the question, by revealing the necessity for putting the law of this subject back on the right track in that state. [See, *Statement As To Jurisdiction*, pp. 14-15.] The error of the state courts originated by treating *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, in which the true rule was expounded, not as establishing the supreme law of the land [see *Cooper v. Aaron*, 358 U.S. 1, 18] but as merely another case that could not and need not be followed because the law had been settled otherwise in California by *In re Madera Irrigation Dist.*, 92 Cal. 296, 28 Pac. 272,

Madera was decided before *Fallbrook* and without benefit of this Court's views on the subject. Furthermore, it went off on the proposition that the statute adequately provided for a hearing. [See, 92 Cal. at 324, 28 Pac. at 278-279.]

Be that as it may, in the first California case to be decided after this Court's views had been expressed in *Fallbrook*, the state Supreme Court (although on a somewhat different point from ours), merely followed *Madera* slavishly without any discussion or apparent awareness of *Fallbrook*. [*People v. Ontario*, 148 Cal. 625, 84 Pac. 205.] When our point did arise after *Fallbrook* had been decided, the state Supreme Court again did no more than to follow *Madera*, saying that notwithstanding "any expression in the *Fallbrook Irrigation* case, we are committed to the reasoning of the *Madera District* case, which was followed in *People v. Ontario*, [*supra*, 148 Cal. 625, 84 Pac. 205] long after the decision in the other case had been made . . ." [*Henshaw v. Foster*, 176 Cal. 507, 514-515, 169 Pac. 82, 85.]

From that time on California has continued to follow *Henshaw* and *Madera*, giving no visible heed to the contrary decisions of this Court, other than to say, for example, that the *Fallbrook* rule does not apply to quasi-municipal corporations—which, of course, is merely another way of expressing continued adherence to *Henshaw* and *Madera* instead of to the constitutional doctrine of this Court. [See, *In re Orosi Pub. Util. Dist.*, 196 Cal. 43, 51-52. Also, *Morrison v. Smith Bros. Inc.*, 211 Cal. 30, 293 Pac. 53, in which neither *Fallbrook* nor any other decision to the point from this Court was mentioned or discussed.] The

court below in the case at bar persisted in this slavish adherence to the errant California rule.

2. Under the statute here drawn in question a California Municipal Water District is created and exists for one, and only one purpose. That purpose is to provide water for the beneficial use of such of the lands included within its boundaries as need or take the water. It has no governmental powers or functions other than the taxing power with which to pay for its water service. [*Cal. Water Code* (1963) sec. 71610; *Statement As To Jurisdiction*, Appendix "B," pp. 24-25.] It is not the kind of an entity that is designed for local self-government or that provides facilities or services or performs political functions that are of general benefit to the community as a whole, but which may or may not produce to some part of the included lands a special benefit different from that enjoyed by the mass. [See, *Podesta v. Linden Irr. Dist.*, 141 Cal. App. 2d 38, 54, 296 P. 2d 401, 411-412; *County of Los Angeles v. Marblehead Land Co.*, 95 Cal. App. 602, 614-615, 273 Pac. 131, 137; *People v. Reclamation District No. 551*, 117 Cal. 114, 121-123, 48 Pac. 1016, 1017, 1018.] The water district's benefits, if any, are peculiar and special to the lands using the water that the district provides. That is what makes it in fact an assessment or special improvement district, rather than a municipal corporation exercising political or governmental functions. [See, *Beveridge v. Lewis*, 137 Cal. 619, 623-624, 70 Pac. 1083, 1085-1086; *Federal Construction Co. v. Ensign*, 59 Cal. App. 200, 216-217, 210 Pac. 536, 540; *Brooks v. Oakland*, 160 Cal. 423, 426-429, 117 Pac. 433, 434-436.]

In this respect the district is indistinguishable from those involved in the cases upon which we rely, and in respect of which this Court held that due process required that owners of included lands be given an opportunity to be heard on the question of benefits unless, as is not true in the instant case, the boundaries of the district were fixed by the legislature. For example, in *Chesebro v. Los Angeles County Flood Control District*, 306 U.S. 462, the district was formed for the single purpose of controlling flood and storm waters in the district. [306 U.S. at 460.] It had the same kind of bonding assessment and taxing powers as our district has.* Like ours, it had no general governmental powers or functions. [Cf., *Cal. Stats. 1915*, c. 755, secs. 2, 6, 10, pp. 1502, 1505, 1507, with *Cal. Water* Code (1963) secs. 71860, 72090 *et seq.*, *Statement As To Jurisdiction*, Appendix "B, pp. 28-31.] The label "quasi-municipal corporation" cannot hide the reality that our district is no different from the flood-control district involved in *Chesebro*.

The road district involved in *Browning v. Hooper*, 269 U.S. 396, also was no different in essential characteristics from ours. It too was formed for one purpose, *i.e.*, to construct and maintain roads in the district. It too was authorized to issue bonds and levy taxes to pay for the district's activities. Its boundaries too were determined by those who petitioned for its formation. It too had no general governmental powers. Nonetheless, the statute under which it was formed was held unconstitutional because it did not provide owners of included lands a hearing on the question of benefits. Looking through names to substance or reality, our district is no different. "Realities must

dominate the judgment." [*Appalachian Coals v. United States*, 288 U.S. 344, 360. See also *Costello v. Immigration Service*, 375 U.S. ...., 84 S. Ct. 580, 587, 24 C. C. H. Sup. Ct. Bull. 653, 673.]

Similar comparisons can be made between our district and those with which the other cases cited by us were concerned. [*Statement As To Jurisdiction*, p. 12.] In such of them as upheld the constitutionality of the enabling legislation, the ground of decision was not that the district was a quasi-municipality but that the statute provided for the requisite hearing. It was made clear that had that not been so the statute would be unconstitutional. [See, *e.g.*, *Embree v. Kansas Road Dist.*, 240 U.S. 242, 247; *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 166-167, 170-171.[5]

The reality of this case is that the facts relating to the purpose, formation, powers and benefits of our district are the same as those considered by this Court in the cases we have cited. It is those facts, not mere names, that must govern decision here.

3. We have urged that the question here is substantial because the decision below is directly counter to the well established rule in this Court that a statute is unconstitutional that delegates to private persons, without any legislative standards or governmental supervision, the power to control the property of another. [*State-*

[5]The progenitor of the California rule upon which appellees rely was *In re Madera Irrigation District*, *supra*, 92 Cal. at 323-324, 28 Pac. at 278-279. It dictated the result in *Henshaw v. Foster*, *supra*, 176 Cal. at 514-516, 169 Pac. at 85-86, upon which appellees lean so heavily. It is, therefore, interesting to note that in *Fallbrook* this Court was not unware of the existence of the doctrine exemplified by those cases, for *Madera* was cited in argument by both appellants and appellees. [164 U. S. at 124, 126.]

ment As To Jurisdiction, pp. 13-14.] Appellees' reply is nothing more than a play on words. [See, *Motion to Dismiss or Affirm*, p. 17.] In the two cases cited by appellees' the "delegation" involved was delegation of legislative power to one of the non-legislative departments of government—obviously quite a different matter from the kind of delegation we are talking about. Even so, in *Ohio v. Akron Park District*, 281 U.S. 74, 79, cited by appellees, the question was held not substantial because "repeated decisions" of this Court had settled the rule in favor of a delegation of the sort there involved, and *in accord* with the decision below. Our case is just the opposite. Here, the earlier decisions of this Court (we have cited three) have settled the rule *against* the view taken below. In *Neblett v. Carpenter*, 305 U.S. 297, 302, the other of appellees' citations, the holding was not that the question was not substantial but that it was not a federal question but only one of state law.

Conclusion.

The motion to dismiss or affirm should be denied; and probable jurisdiction noted.

Respectfully submitted.

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APPENDIX.

State Statutes Cited.

California Water Code (1963)

"§ 72095. The board shall direct that, at the time and in the manner required by law for the levying of taxes for county purposes the board of supervisors shall levy, in addition to any other tax it levies, a tax upon the property within the district, or improvement district therein benefited by the bonded debt, as the case may be, at the rate or rates fixed by the board. The officer or body having authority to levy taxes within each county shall levy the tax so required."

"§ 72097. All county officers charged with the duty of collecting taxes shall collect district taxes at the same time and in the same form and manner as county taxes are collected, and shall pay the collected district taxes to the district."

California Code of Civil Procedure

"§ 389. A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.

"A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action is a conditionally necessary party.

"When it appears that an indispensable party has not been joined, the court shall order the party asserting

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